United Nations

A/CN.9/489

General Assembly

Distr.: General
13 March 2001

Original: English

United Nations Commission
on International Trade Law
Thirty-fourth session
Vienna, 25 June-13 July 2001

Receivables Financing

Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade

Note by the Secretariat

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I. Introduction

1. The United Nations Commission on International Trade Law (UNCITRAL), at its twenty-eighth session, in 1995, decided to entrust the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing.[1] The Commission, at that session, had before it a report of the Secretary-General entitled: "Assignment in receivables financing: discussion and preliminary draft of uniform rules" (A/CN.9/412). It was agreed that the report, setting forth the concerns and the purposes underlying the project and the possible contents of the uniform law, would provide a useful basis for the deliberations of the Working Group.[2]

2. The Working Group commenced its work at its twenty-fourth session, in November 1995, by considering the report of the Secretary-General.[3] At its twenty-fifth to thirty-first sessions, the Working Group considered revised draft articles prepared by the Secretariat,[4] and, at its twenty-

[1] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

[2] Ibid., para. 379. At its twenty-sixth and twenty-seventh sessions, the Commission had considered two other reports of the Secretary-General (A/CN.9/378/Add.3 and A/CN.9/397). For the Commission's discussion of those reports, see ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-30.1 and Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214, respectively.

[3] The report of the Working Group is contained in document A/CN.9/420.

[4] The draft articles prepared by the Secretariat are contained in documents

ninth to thirty-first sessions, it adopted a draft Convention.[5] At its thirty-first session, the Working Group had before it a preliminary commentary on the draft Convention prepared by the Secretariat.[6] At that session, the Working Group agreed that the Secretariat should revise and submit the commentary to the Commission at its thirty-third session, to be held in New York from 12 June to 7 July 2000.[7] At that session, the Commission adopted articles 1 through 17 of the draft Convention and referred articles 18 through 44 of the draft Convention as well as articles 1 to 7 of the annex to the Working Group. The Commission requested the Working Group to proceed with its work expeditiously so that the draft Convention be submitted to the Commission at its thirty-fourth session, to be held in Vienna from 25 June to 13 July 2001.[8] The Commission also requested the Secretariat to prepare and submit to the Commission at its thirty-fourth session a revised version of the commentary.[9] The Working Group met in Vienna from 11 to 22 December 2000 and adopted articles 18 to 47 of the draft Convention and 1 to 9 of the annex to the draft Convention.[10]

3. The present note has been prepared pursuant to the request of the Commission. It is intended to provide a summary of the reasons for the adoption of a provision and its main objectives, along with explanations and interpretations of particular terms, without, however, giving a complete account of the *travaux préparatoires* or of all proposals and provisions that were not retained. For the benefit of those seeking fuller information on the history of a given provision, the commentary lists the references to the relevant portions of the reports of the sessions of the Working Group and the Commission.[11] The present note covers articles 1 through 17 of the draft Convention and is based on the consolidated text of the draft Convention as adopted by the Working Group at its last session, held in Vienna from 11 to 22 December 2000. The commentary on the remaining articles of the draft Convention will be issued in a subsequent document.

A/CN.9/WG.II/WP.87, A/CN.9/WG.II/WP.89, A/CN.9/WG.II/WP.93, A/CN.9/WG.II/WP.96, A/CN.9/WG.II/WP.98, A/CN.9/WG.II/WP.102 and A/CN.9/WG.II/WP.104. The reports of the Working Group are contained in documents A/CN.9/420, A/CN.9/432, A/CN.9/434, A/CN.9/445, A/CN.9/447, A/CN.9/455, A/CN.9/456 and A/CN.9/466.

5 A/CN.9/455, para. 17; A/CN.9/456, para. 18; and A/CN.9/466, para. 19.

6 A/CN.9/WG.II/WP.105 and A/CN.9/WG.II/WP.106.

7 A/CN.9/466, para. 215.

8 Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 A/55/17, paras. 186-188.

9 Ibid., paras. 190-191. The commentary that was before the Commission at its thirty-third session appears in document A/CN.9/470.

10 A/CN.9/486.

11 In order to avoid confusion, no special reference is made to previous article numbers, which, in the course of the preparation of the draft Convention, were altered several times. However, any earlier number will be apparent from the relevant discussion in the reports of the Working Group. Annex II to A/CN.9/486 contains an index to the final renumbering of articles.

II. Analytical commentary

A. Title and preamble

Draft Convention on Assignment of Receivables in International Trade

Preamble

The Contracting States,

Reaffirming their conviction that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

Have agreed as follows:

References

A/CN.9/420, paras. 14-18; A/CN.9/434, paras. 14-16; A/CN.9/455, paras. 157-159; A/CN.9/445, paras. 120-124; A/CN.9/456, paras. 19-21 and 60-65; and A/55/17, paras. 181-183.

Commentary

Title

4. The draft Convention is intended to apply to a wide variety of assignment-related practices (for a brief description of the practices, see paras. 7-13; for a definition of the terms "assignment", "receivable", "assignor", "assignee" and "debtor", see article 2). The focus of the draft Convention is on financing practices. However, the title of the draft Convention contains no reference to financing. The reason is the need to avoid giving the impression that the scope of the draft Convention is limited to purely financing transactions and excludes important service transactions (e.g. assignments in international factoring transactions in which protection against debtor default, book-keeping or collection services are provided).

5. The reference to international trade is intended to reflect the overall objective of the draft Convention to facilitate the movement of goods and services across borders and appropriately clarify that the draft Convention applies to assignments with an international and commercial element. However, it is not intended to limit the scope of the draft Convention, for example,

only to assignments of receivables generated in international trade, excluding assignments of domestic receivables, or only to international assignments of domestic receivables, excluding domestic assignments of international receivables. In addition, the reference to international trade should not be interpreted as suggesting that the draft Convention may in no case affect domestic assignments of domestic receivables. Such assignments are affected by article 24, under which a conflict between a domestic and a foreign assignee of domestic receivables is referred to the law of the assignor's location (on this matter, see also paras. 21 and 22). They are also affected by article 1, paragraph 1 (b) under which the draft Convention may apply to a domestic assignment of a domestic receivable in a chain of assignments if a prior subsequent assignment falls within the ambit of the draft Convention. Furthermore, the reference to international trade is not intended to exclude assignments of consumer receivables (on this matter, see paras. 36, 103 and 132).

Preamble

6. The preamble is intended to serve as a statement of the general principles on which the draft Convention is based and which, under article 8, may be used in filling the gaps left in the draft Convention. These principles include: the facilitation of both commercial and consumer credit at more affordable rates, which is in the interest of all parties involved, assignors, assignees and debtors; the principle of debtor protection, according to which the debtor's legal position is not affected unless expressly stated otherwise in the draft Convention; the promotion of the movement of goods and services across borders; the enhancement of certainty and predictability as to the rights of parties involved in assignment-related transactions; the modernization and harmonization of domestic and international laws on assignment, both at the substantive and the private international law level; the facilitation of new practices and the avoidance of interference with current practices; and the avoidance of interference with competition.

Transactions covered

7. In view of the broad definition of the term "receivable" in article 2 (a) ("contractual right to payment of a monetary sum"), the draft Convention applies to a wide array of transactions. In particular, the draft Convention covers the assignment of trade receivables (arising from the supply of goods, construction or services between businesses), consumer receivables (arising from consumer transactions) and sovereign receivables (arising from transactions with a governmental authority or a public entity). With a view to clarifying the context of application of the draft Convention, those practices are described briefly in the following paragraphs. The list of practices covered by the draft Convention cannot be exhaustive, in particular in view of the rapid development of new practices.

8. First of all, included are traditional financing techniques relating to trade receivables, such as asset-based financing, factoring and forfaiting. Revolving credit facilities and purchase-money financing are the most common types of asset-based financing. Under a revolving loan facility, a lender makes loans from time to time at the request of its borrower. Such loans are secured by a security interest in all of the borrower's existing and future receivables or inventory (i.e. a revolving pool of goods that are bought, stored and sold on a regular basis) or both. They are generally used by the borrower to finance its ongoing working capital needs. The amount of loans available under this type of loan facility is based upon a specified percentage of the value of the collateral. This percentage (generally known as the "advance rate") is determined by the lender based upon the lender's estimate of the amount it would realize on the collateral if it were to look to it as a source for repayment of the loan. Typically, the advance rate ranges from 70% to 90% with respect to collateral consisting of receivables and 40% to 60% with respect collateral consisting of inventory. The revolving loan structure is, from an economic standpoint, highly efficient and generally considered to be beneficial to the borrower, since it is aimed at matching borrowings to the borrower's "cash conversion cycle" (i.e. acquiring inventory, selling inventory, creating receivables, receiving payments on the receivables and acquiring more inventory to begin the cycle again).

9. The term "purchase-money financing" refers to a financing arrangement under which a seller of goods or other property extends credit to its purchaser to enable the purchaser to acquire the property, or a creditor makes a credit or loan to the purchaser to enable the purchaser to acquire the property. In both cases, the seller or creditor will receive a security interest in the property to secure the credit or loan and in the resulting receivables. A common type of purchase-money financing is known as "floor-planning". Under a floor-planning facility, a creditor makes loans to finance the acquisition of a debtor's stock of inventory. This type of facility is often provided to debtors that are dealers in items, such as automobiles, trucks or other vehicles, computers and large consumer appliances. The creditors in these arrangements are often finance entities affiliated with the manufacturers. They normally take a security interest in the inventory and in any receivables resulting from the sale of inventory. Another common type of purchase-money financing is known as "purchase order financing". Under this type of facility, the creditor typically provides funds to finance the fulfillment by the debtor of specific purchase orders, which often includes the purchase by the debtor of the inventory required to complete the orders. The loan will be secured by the purchase orders, the purchased inventory and the resulting receivables. Among its other benefits to debtors, purchase-money financing serves a pro-competitive purpose in that it enables a debtor to choose different creditors to finance different components of the debtor's business in the most efficient and cost- effective way.

10. Factoring, in its most common form, is the outright sale of a large number of receivables with or without recourse to the assignor in the case of debtor default). Forfaiting, in its basic form, is the outright sale of single, large-value receivables, whether they incorporated in a negotiable instrument or not, without recourse. In these types of transactions, assignors assign to financiers their rights in receivables arising from the sale of the assignors' goods or services. The assignment in such transactions is normally an outright transfer but may also, for various reasons (e.g. stamp duty), be for security purposes. The purchase price is adjusted depending on the risk and the time involved in the collection of the underlying receivable. Beyond their traditional forms, those transactions appear in a number of variants tailored to meet the various needs of parties to international trade transactions. For example, in invoice discounting, there is an outright sale of a large number of receivables without debtor notification but with full recourse against the assignor in the case of debtor default. Inn maturity factoring, there is full administration of the sales ledger, collection from debtors and protection against bad debts, but without any financing. In international factoring, receivables are assigned to a factor in the assignor's country ("export factor") and then from the export factor to another factor in the debtor's country ("import factor"). The second assignment is made for collection purposes and the factors do not have recourse against the assignor in the case of debtor default (non-recourse factoring). All those transactions are covered in the draft Convention regardless of their form.

11. The draft Convention also covers innovative financing techniques, such as securitization and project financing on the basis of the future income flow of a project. In a securitization transaction, an assignor, creating receivables through its own efforts ("originator"), assigns, usually by way of an outright transfer, these receivables to an entity ("special purpose vehicle" or "SPV"). The SPV is fully owned by the assignor and specially created for the purpose of buying the receivables and paying their price with the money received from investors to whom the SPV sells the receivables or securities backed by the receivables. The segregation of the receivables from the originator's other assets allows the price paid by investors (or the money lent) to be linked to the financial strength of the receivables assigned and not to the creditworthiness of the assignor. It also insulates the receivables from the risk of the insolvency of the originator. Accordingly, the originator may be able to obtain more credit than would be warranted on the basis of its own credit rating. In addition, by gaining access to international securities markets, the originator may be able to obtain credit at a cost that would be lower than the average cost of commercial bank-based credit.

12. In large-scale, revenue-generating infrastructure projects, sponsors raise the initial capital costs by borrowing against the future revenue stream of the project. Thus, hydroelectric dams are financed on the security of the future income flow from electricity fees, telephone systems are paid for by the future revenues from telecommunications charges and highways are

constructed with funds raised through the assignment of future toll-road receipts. Given the draft Convention's applicability to future receivables, these types of project finance may be reduced to transfers, usually for purposes of security, of the future receivables to be generated by the project being financed. In this context, it should be emphasized that the draft Convention's exclusion of assignments made for personal, family or household purposes (see article 4, paragraph 1 (a)) will not act to exclude the assignment of consumer receivables.

13. Many other forms of transactions will be covered, including the refinancing of loans for the improvement of the capital-obligations ratio or for portfolio diversification purposes, loan syndication and participation and the assignment of an insurance company's contingent obligation to pay upon loss. Also covered are practices relating to the assignment of real estate or aircraft receivables and of receivables arising from certain financial transactions (e.g. receivables owed on the termination of all outstanding financial contracts governed by netting agreements; see article 4, paragraph 2 (b) and para. 47).

B. Chapter I

Scope of application

Commentary

Structure of chapter I

14. In chapter I, scope-related issues are dealt with in different provisions for the sake of clarity and simplicity in the text. Article 1 defines the substantive scope in general terms, as well as the territorial scope of application of the draft Convention. Articles 2 and 3 define the substantive scope in more detailed terms (definitions of assignment, receivable and internationality of an assignment or a receivable). Article 4 deals with excluded transactions. Article 5 (definitions and rules of interpretation) appears in chapter II of the draft Convention since the terms defined therein do not raise mainly scope-related issues.

Article 1
Scope of application

1. This Convention applies to:

(a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State; and

(b) Subsequent assignments, provided that any prior assignment is governed by this Convention.

2. This Convention applies to subsequent assignments that satisfy the criteria set forth in paragraph 1 (a) of this article, even if it did not apply to any prior assignment of the same receivable.

3. This Convention does not affect the rights and obligations of the debtor unless, at the time of the conclusion of the original contract, the debtor is located in a Contracting State or the law governing the original contract is the law of a Contracting State.

4. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs 1 and 2 of this article. However, those provisions do not apply if a State makes a declaration under article 39.

5. The provisions of the annex to this Convention apply as provided in article 42.

References

A/CN.9/420, paras. 19-32; A/CN.9/432, paras. 13-38; A/CN.9/434, paras. 17-41; A/CN.9/445, paras. 45-48 and 125-145; A/CN.9/447, paras. 143-146; A/CN.9/455, paras. 41-46 and 160-173; A/CN.9/456, paras. 22-37; A/CN.9/466, paras. 145-149; A/55/17, paras. 13-17; and A/CN.9/486, paras. 70-75.

Commentary

Substantive and territorial scope of application

15. Under article 1, the draft Convention applies to assignments of receivables (for a definition of the terms "assignment", "subsequent assignment", "receivable", "assignor", "assignee" and "debtor", see article 2). There are two conditions for the draft Convention to apply. There needs to be an element of internationality (for an exception, see article 1, paragraph 1 (b)) and an element of a territorial connection between certain parties and a Contracting State (for an exception, see article 1, paragraph 4). The element of internationality may relate to the assignment or to the receivable. Accordingly, the draft Convention applies to assignments of international receivables, whether or not the assignments are international or domestic, and to international assignments of receivables, even if the receivables are domestic (for comments on internationality, see paras. 38-41). The element of territorial connection may relate to the assignor only or to the assignor and the debtor as well. For the application of the provisions of the draft Convention other than the debtor-related provisions (e.g. chapter IV, section II), only the assignor needs to be located in a Contracting State. For the application of the draft Convention as a whole, the debtor too needs to be located in a Contracting State (or the law governing the receivable needs to be the law of a Contracting State; for a discussion of the term "location", see paras. 67-69).

16. This approach is based on the assumption that the main disputes that the draft Convention would be called upon to resolve would be addressed if the assignor (and, only for the application of the debtor-related provisions, the debtor too) is located in a Contracting State. This approach also takes into account that application of the provisions of the draft Convention other than those dealing with the rights and obligations of the debtor would not affect the debtor and, therefore, the debtor's location (or the law governing the original contract) should not matter for their application. It also takes into account that enforcement would normally be sought in the place of the assignor's or the debtor's location and there is thus no need to make reference to the assignee's location.

17. The territorial scope of application of the draft Convention is sufficiently broad and there is no need to extend it to cases in which no party may be located in a Contracting State but the law of a Contracting State is applicable by virtue of private international law rules. In addition, relying on private international law rules for the application of the draft Convention might introduce uncertainty. Private international law on assignment is not uniform and, in any case, parties would not know at the time of the conclusion of a transaction where a dispute might arise and, as a result, which private international law rules might apply. However, if the forum is located in a non-Contracting State, the courts are not bound by the draft Convention. Therefore, the courts of a non-Contracting State may not be precluded from applying, at least, the substantive law provisions of the draft Convention as part of the law designated by their private international law rules (if *renvoi* is prohibited under the law of the forum, the private international law rules of the draft Convention would not be applicable in such a case; for the meaning of *renvoi*, see para. 70).

18. Under article 1, paragraph 3, the debtor-related provisions of the draft Convention may apply to situations in which the debtor is not located in a Contracting State but the law of a Contracting State governs the contract from which the assigned receivable arises ("the original contract"; see article 5 (a)). In this context, a different approach to the territorial scope of application of the draft Convention is followed, since both the laws referred to would be known to the debtor. In line with article 1, paragraph 1, article 1, paragraph 3 provides that the debtor needs to be located in a Contracting State or the original contract needs to be governed by the

law of a Contracting State at the time of the conclusion of the original contract. This approach is followed so as to ensure predictability of the application of the draft Convention with respect to the debtor (the same approach is followed in article 40). However, as a result of this approach, in the case of future receivables assigned domestically, parties may not be able to determine (at least, before the future receivables arise) whether the draft Convention would apply to the rights and obligations of the debtor (for a related problem with regard to future receivables assigned domestically, see paras. 40 and 41).

Subsequent assignments

19. The draft Convention is designed to apply also to subsequent assignments. Such assignment may be made, for example, in the context of international factoring, securitization and refinancing transactions. The only condition for the application of the draft Convention is that a prior assignment is governed by the draft Convention. Accordingly, even a domestic assignment of domestic receivables may be brought into the ambit of the draft Convention if it is subsequent to an international assignment. The reason for such an approach is that, unless all assignments in a chain of assignments are made subject to one and the same legal regime, it would be very difficult to address assignment-related issues in a consistent manner (*continuatio juris*).

20. The draft Convention is also intended to apply to subsequent assignments that in themselves fall under article 1, paragraph 1 (a), whether or not any prior assignment is governed by the draft Convention. As a result, the draft Convention may apply only to some of the assignments in a chain of assignments. This approach is a departure from the principle of *continuatio juris*. However, it is followed so as to ensure that parties to assignments in securitization transactions, in which the first assignment is a domestic one and relates to domestic receivables, are not deprived of the benefits that may be derived from the application of the draft Convention. This approach is based on the assumption that it would not unduly interfere with domestic practices (on this matter, see paras. 21 and 22).

Relationship with national law

21. As a result of the fact that the draft Convention covers international assignments of domestic receivables or even domestic assignments of domestic receivables made in the context of subsequent assignments, business parties in domestic transactions could benefit from increased access to international financial markets and thus to potentially lower-cost credit. The interests of assignors protected, for example, by national law prohibitions of assignments of future receivables or of global assignments, would not be unduly interfered with (see para. 94. The draft Convention does not preclude the assignor from offering its receivables to different lenders for credit (e.g. to a supplier of materials on credit and to a financing institution for working capital) in that it does not give priority to one lender over the other. The interests of debtors, protected by national legislation, would not be unduly interfered with either. The draft Convention requires that the debtor be located in a Contracting State (or that the law governing the original contract is the law of a Contracting State) and limits the effects of an assignment on the debtor to those specified in articles 19-23.

22. The interests of domestic assignees would not be unduly interfered with either, because the draft Convention does not give priority to a foreign over a domestic assignee. It merely specifies which national law would govern priority (see articles 24 and 5 (m)). In addition, a conflict between a domestic and a foreign assignee of domestic receivables is not covered by the draft Convention, unless the assignor is located in a Contracting State (see article 1, paragraph 1 (a)). That State, by definition in a domestic assignment of a domestic receivable, would be the State in which both the domestic debtor and the domestic assignee would be located (see article 3). However, in the case of a conflict between an assignment by a branch office and a duplicate assignment of the same receivables by the head office, different laws may apply. This may occur if the branch or the head office is located in a non-Contracting State in which the conflict is referred to the law of the branch office's location, while under the draft Convention reference would be made to the law of the head office's location (see article 5 (h)).

Scope of chapter V

23. Under article 1, paragraph 4, chapter V applies to assignments with an international element as defined in article 3, whether or not there is a territorial connection between an assignment and a Contracting State. The scope of application of chapter V is limited to international transactions as defined in article 3. In order to reduce any conflicts with other conventions, dealing with private international law issues of assignment,[12] article 1, paragraph 4 allows States to opt out of chapter V. On the other hand, the scope of chapter V is extended beyond the scope of the other provisions of the draft Convention, since chapter V applies irrespective of any territorial connection with a Contracting State. As a result, chapter V may perform a double function. It may supplement the other provisions of the draft Convention or provide a second layer of harmonization, a so called mini-convention along the lines of chapter VI of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).

Application of the annex

24. Article 24 of the draft Convention refers priority issues to the law of the assignor's location (as to the meaning of "location", see article 5 (h)). In recognition of the fact that some States may need to modernize or adjust their priority rules, article 1, paragraph 5 allows States to opt into one of the substantive law priority rules set forth in the annex. Article 42 clarifies the effect of a declaration made under article 1, paragraph 5.

Article 2
Assignment of receivables

For the purposes of this Convention:

(a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of all or part of, or an undivided interest in, the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

(b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

References

A/CN.9/420, paras. 33-44; A/CN.9/432, paras. 39-69 and 257; A/CN.9/434, paras. 62-77; A/CN.9/445, paras. 146-153; A/CN.9/456, paras. 38-43; A/CN.9/466, paras. 87-91; and A/55/17, paras. 18-24.

Commentary

Assignment and contract of assignment or financing contract

25. Like most legal systems, the draft Convention recognizes the distinction between the assignment itself as a transfer of property and the contract of assignment as a transaction creating personal obligations (in other words, between the assignment and its *causa*, that is, a sale, security agreement, gift or payment). However, the draft Convention does not deal with the relationship between the assignment and the contract of assignment. In particular, the draft Convention does not address the question whether the effectiveness of an assignment depends on

[12] For example, the European Union Convention on the Law Applicable to Contractual Obligations, Rome, 1980 ("the Rome Convention") and the Inter-American Convention on the Law Applicable to International Contracts, Mexico City, 1994 ("the Mexico City Convention").

the validity of the contract, which is treated differently from one legal system to another. In addition, the draft Convention does not refer to the purpose of an assignment, that is whether an assignment is made for purely financing purposes or for bookkeeping, collection, protection against debtor default, risk-management, portfolio diversification or other purposes. A reference to the "financing" purpose of a transaction could create a special regime on assignments for financing purposes, even though one is not needed. Such a reference could also result in unnecessarily excluding from the scope of the draft Convention important transactions in which services but no financing may be provided. Furthermore, the "commercial" purpose of the transaction could create uncertainty, since a uniform definition of the term in a convention is neither feasible nor desirable.

Contractual issues

26. The draft Convention does not address contractual issues other than those dealt with in articles 13 to 16 and 29. For example, whether "value, credit or services" (i.e. consideration) is given or promised at the time of the assignment or at an earlier time is not mentioned in article 2 or elsewhere in the draft Convention, since it is a matter for the contract of assignment or the financing contract. As a result, the draft Convention would apply to both assignments for value and to gratuitous assignments.

"Transfer by agreement"

27. With the intention of bringing within the ambit of the draft Convention, in addition to assignments, other practices involving the transfer of property rights in receivables, such as contractual subrogation or pledge, article 2 defines "assignment" as a transfer. This approach takes into account the fact that significant receivables financing transactions, such as factoring, take place, in some legal systems, by way of a contractual subrogation or pledge. Rather than creating a new type of assignment, the draft Convention is aimed at providing uniform rules on assignment and assignment-related practices with an international element. Although covered in theory by currently existing national law, such practices cannot be sufficiently developed in view of the inherent limitations on the application of national law in an international context posed by mandatory rules and public policy considerations of the forum. The reference to transfers "by agreement" is intended to exclude transfers by operation of law (e.g. statutory subrogation) and unilateral assignments (i.e. where there is no agreement of the assignee, whether explicit or implicit).

28. Both outright transfers, including those made for security purposes, and assignments by way of security are covered. In order to avoid any ambiguity as to that matter, article 2 (a) covers it explicitly and creates the legal fiction that, for the purposes of the draft Convention, the creation of security rights in receivables is deemed to be a transfer. However, the draft Convention does not define outright assignments and assignments by way of security. In view of the wide divergences existing among legal systems as to the classification of assignments, this matter is left to other law applicable outside the draft Convention. In fact, an assignment by way of security could possess attributes of an outright transfer, while an outright transfer might be used as a security device.

National form and opting-in

29. There is no condition for the application of the draft Convention other than the conditions described in chapter I. In particular, there is no requirement for the assignment to be in a certain form for the draft Convention to apply. In fact, article 8 refers form to law applicable outside the draft Convention. In addition, there is no need for the parties to the assignment to indicate in any way their will to submit their assignment to the draft Convention. If parties located in a Contracting State opt into the draft Convention anyway, in line with article 6, their agreement should not affect the rights of the debtor and other third parties. If parties are located in a non-Contracting State, the law applicable to the choice of law by the parties would determine its effects.

"From one person to another person"

30. Both the assignor and the assignee can be legal entities or individuals, whether merchants or consumers. In particular, the assignment between individuals is covered, unless the assignee is a consumer and the assignment is made for his or her own consumer purposes (article 4, paragraph 1 (a)). As a result, the assignment of credit card receivables or of loans secured by real estate in securitization transactions or of toll-road receipts in project financing arrangements falls within the ambit of the draft Convention. In view of the Commission's understanding that the singular includes the plural and vice versa, an assignment made by many persons (e.g. joint owners of receivables) or to many persons (e.g. a syndicate of financiers) is also covered (so is the assignment of more than one receivable). In the determination, however, of the territorial scope of application or internationality, each assignment is to be considered as a separate assignment and to meet the conditions of chapter I for the draft Convention to apply (as to cases involving multiple debtors, see para. 37). In an assignment to an agent acting on behalf of several persons, whether there is one assignee or more depends on the exact authority of the agent, which is a matter left to law applicable outside the draft Convention. If the agent acts as a mere intermediary, accepting and forwarding correspondence to the persons it represents for instructions, and then forwarding the instructions, an assignment to several persons, on whose behalf the assignee is acting, may be involved. If the agent has the authority to make decisions on behalf of the persons represented, an assignment to one person may be involved.

"Contractual right to payment of a monetary sum"

31. The draft Convention applies to the assignment of receivables arising from any type of contract, in the broadest sense of the term, whether the contract exists at the time of the assignment or not. What is a "contractual" right is a matter of interpretation in accordance with the law governing that right. However, contractual receivables covered include receivables arising under contracts for the supply of goods, construction or services. The assignment of such receivables is covered whether the relevant original contracts are commercial or consumer transactions. For example, toll road receipts are contractual receivables, since the person using the toll road accepts implicitly the offer made implicitly by the public or private entity operating the toll road. The assignment of receivables in the form of royalties arising from the licensing of intellectual property is also covered. So is the assignment of damages for breach of contract and of interest (if it was owed under the original contract) or of dividends (arising from shares, whether they were declared at, or arose after, the time of the assignment). However, the assignment of receivables from derivatives, letters of credit or deposit accounts is excluded (see article 4). On the other hand, the transfer of receivables arising by operation of law, such as tort receivables, receivables arising in the context of unjust enrichment, tax receivables or receivables determined in court judgements or arbitral awards, are excluded, unless they are incorporated in a settlement agreement.

32. In principle, the right of the seller (assignor) to any returned goods (e.g. because they are defective) is not a receivable. It is, however, treated as a receivable in the relationship between the assignor and the assignee if it takes the place of the assigned receivable (see articles 5 (j) and 16). Furthermore, non-monetary rights convertible into a monetary sum are receivables the assignment of which is covered. If the conversion is foreseen in the original contract, this result is implicit in article 2. If such a conversion is not foreseen in the original contract, it is in line with the decision to cover the assignment of non-monetary rights converted into damages for breach of contract.

Non-monetary performance rights

33. The assignment of other, non-monetary, contractual rights (e.g. the right to performance, the right to declare the contract avoided) is not covered. To the extent that assignees would rely not on the receivables but on such non-monetary performance rights, the assignment of such rights either does not form part of significant transactions or may be prohibited where the right to performance is a personal right. The assignment of contracts, which involves an assignment of contractual rights and a delegation of obligations, is not covered either. While such transactions may form part of financial arrangements, the financier would normally rely mainly

on the receivables. As to the delegation of obligations, it is not covered because it raises issues going far beyond the desirable scope of the draft Convention.

Parts or undivided interests in receivables

34. Important practices covered by the draft Convention involve the assignment of parts or undivided interests in receivables (e.g. securitization, loan syndication and participation). The effectiveness of partial assignments is not recognized in all legal systems. Article 9, therefore, validates such assignments. In addition, in order to avoid any uncertainty as to whether the draft Convention as a whole applies to them article 2 contains an explicit reference to such assignments. This result is particularly useful with respect to the application of the debtor-protection provisions to cases where the receivable may be partially assigned to several assignees (as to the debtor's discharge in the case of a notification of a partial assignment, see article 19, paragraph 6).

Personal rights (statutory assignability)

35. The draft Convention treats the question of the assignment of personal rights (e.g. wages, pensions or insurance policies) and of rights the assignment of which is prohibited by law (e.g. sovereign receivables) as one of effectiveness not of scope. Accordingly, article 2 does not exclude the assignment of personal rights (involved, for example, in significant financing practices, such as the financing of temporary employment services). If such assignments are not prohibited under national law, the draft Convention recognizes their effectiveness. If, however, such assignments are prohibited under national law, the draft Convention does not affect that prohibition (see article 9, paragraph 3).

"[Owed by] a third person" (merchant, consumer, State or other public entity)

36. Apart from the assignor and the assignee, the debtor too could be a legal entity or an individual, a merchant or a consumer, a governmental authority or a financial institution. Unlike the Unidroit Convention on International Factoring ("the Ottawa Convention"), the draft Convention does not exclude commercial practices involving the assignment of contractual receivables owed by consumers, unless the assignment is to a consumer for his or her consumer purposes (see article 4, paragraph 1 (a)). Assignments of consumer receivables form part of significant practices, such as securitization of credit card receivables, the facilitation of which has the potential to increase access to lower-cost credit by manufacturers, retailers and consumers and, as a result, could facilitate international trade in consumer goods. However, while covering the assignment of consumer receivables, the draft Convention is not intended to override consumer-protection law (see paras. 103 and 132).

37. The assignment of receivables owed by a Government or a public entity is also covered, unless their assignment is prohibited by law (see article 9, paragraph 3). However, the State in which the sovereign debtor is located may enter a reservation as to the rule of article 11 according to which assignments are effective notwithstanding a contractual limitation on assignment (see article 40). Receivables owed by debtors in financial contracts, such as loans, deposit accounts, swaps and derivatives, are not covered by the draft Convention (see article 4 and paras. 47-54). Furthermore, the assignment of one or more than one receivable, whether in whole or in part, owed jointly (i.e. fully) and severally (i.e. independently) by multiple debtors is also covered, provided that the original contract is governed by the law of a Contracting State. Otherwise, in cases where one or more, but not all, debtors are located in a Contracting State, each transaction should be viewed as an independent transaction so as to ensure predictability with regard to the debtor's legal position.

Article 3
Internationality

A receivable is international if, at the time of the conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee

are located in different States.

References

A/CN.9/420, paras. 26-29; A/CN.9/432, paras. 19-25; A/CN.9/445, paras. 154-167; A/CN.9/456, paras. 44, 45, 227 and 228; A/CN.9/466, paras. 92 and 93; and A/55/17, paras. 25-26.

Commentary

38. With a view to achieving certainty in the application of the draft Convention, article 3, following the example of other texts prepared by the Commission or other organizations, defines internationality by reference to the location of the parties (as to the meaning of "location", see article 5 (h)). In the case of more than one assignor, assignee or debtor, internationality is to be determined for each of those parties separately (see paras. 30 and 37). As a result of article 3, once a receivable is international, its assignment is covered by the draft Convention, whether the receivable is assigned to a domestic or to a foreign assignee. On the other hand, even if a receivable is domestic, its assignment may come within the ambit of the draft Convention if it is international or it is part of a chain of assignments that includes an earlier international assignment (see paras. 19 and 20).

39. The international character of an assignment is determined at the time it is made, while internationality of a receivable is determined at the time of the conclusion of the original contract ("at the time it arises"). A change in the location of the parties after the relevant time does not make an international assignment or receivable domestic and vice versa. Determining the internationality of a receivable at the time it arises is justified by the need for a potential assignor or a debtor to know at the time of the conclusion of the original contract which law might apply to a potential assignment. Such knowledge is important for the determination of the availability of the cost of credit to the assignor and, consequently, to the debtor.

40. As a result, however, in the case of a domestic bulk assignment of domestic and international future receivables, the parties may not be able to determine at the time of the assignment whether the draft Convention will apply to the portion of the assignment that relates to international receivables. This means that, depending on whether the draft Convention applies, implied representations as between the assignor and the assignee, as well as the legal position of the debtor may be different. However, the applicable priority rules would not be different, since the draft Convention would cover in any case all possible conflicts of priority, including conflicts with a domestic assignee of domestic receivables.

41. Parties to a domestic bulk assignment of domestic and international future receivables, will, therefore, need to structure their transactions in a certain way to avoid this problem (e.g. by avoiding the assignment of both domestic and international future receivables in one transaction). Where parties are not able to do so, they will be exposed to the possibility that one law may apply to domestic receivables while another law, the draft Convention, would apply to international receivables. This problem, however, is not created by the draft Convention; it exists already outside the draft Convention in cases where domestic and international receivables are assigned. In addition, the draft Convention makes it easier for parties to address this problem at least, to the extent that parties to a domestic assignment will be faced with only two laws (i.e. the law of the country, in which the assignor and the assignee are located, and the draft Convention).

Article 4
Exclusions

1. This Convention does not apply to assignments made:

(a) To an individual for his or her personal, family or household

purposes;

(b) By the delivery of a negotiable instrument, with an endorsement, if necessary;

(c) As part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.

2. This Convention does not apply to assignments of receivables arising under or from:

(a) Transactions on a regulated exchange;

(b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(c) Bank deposits;

(d) Inter-bank payment systems, inter-bank payment agreements or investment securities settlement systems;

(e) A letter of credit or independent guarantee;

(f) The sale, loan or holding of, or agreement to repurchase, investment securities.

3. This Convention does not:

(a) Affect whether a property right in real estate confers a right in a receivable related to that real estate or determine the priority of such a right in the receivable with respect to the competing right of an assignee of the receivable;

(b) Make lawful the acquisition of property rights in real estate not permitted under the law of the State where the real estate is situated.

[4. This Convention does not apply to assignments listed in a declaration made under article 41 by the State in which the assignor is located, or with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, by the State in which the debtor is located or the State whose law is the law governing the original contract.]

References

A/CN.9/432, paras. 18, 47-52, 106 and 234-238; A/CN.9/434, paras. 42-61; A/CN.9/445, paras. 168-179; A/CN.9/456, paras. 46-52; A/CN.9/466, paras. 54-77, 78-86 and 192-195; and A/55/17, paras. 27-109 and 152.

Commentary

42. In view of the broad scope of application of the draft Convention, article 4 is intended to exclude certain practices that are either distinct from assignment-related practices or are already sufficiently regulated.

Assignments for consumer purposes

43. Paragraph 1 (a) excludes from the scope of the draft Convention assignments of trade or consumer receivables from a business entity or a consumer to a consumer but only if they are made for the assignee's personal, family or household purposes. Such assignments are of no practical significance. Accordingly, assignments of receivables arising from consumer

transactions are not excluded, unless such assignments are made to a consumer for his or her consumer purposes.

Assignments of negotiable instruments

44. In order to avoid any interference with the rights of persons derived from negotiable instrument law (i.e. the holder of the instrument and the debtor under the instrument), paragraph 1 (b) excludes transfers of negotiable instruments (i.e. bills of exchange, promissory notes, cheques and bearer documents). The main reason for this approach is that negotiable instrument law is a distinct body of law that treats certain key issues in a way other than the way in which they are addressed in the draft Convention. For example, under negotiable instrument law, if the debtor pays a transferee of the instrument who is not the rightful holder, the debtor is still liable to the holder. Similarly, a person who takes the instrument for value and without knowledge of any hidden defences against the transferor is not subject to those defences.

45. In view of the policy underlying paragraph 1 (b), the focus is on the negotiation of an instrument (i.e. delivery with an endorsement if such endorsement is necessary). As a result, transfers of instruments to the order of the holder by delivery and endorsement and transfers of bearer documents by delivery are excluded. However, transfers of instruments to the order by mere delivery without a necessary endorsement are not excluded. In addition, if a receivable exists both under the contract and in the form of a negotiable instrument, the assignment of the receivable is not excluded. Receivables arising under a contract are often incorporated into a negotiable instrument for the sole purpose of obtaining payment by way of summary proceedings in court, if necessary.

Assignments of receivables in corporate buyouts

46. Paragraph 1 (c) excludes assignments made in the context of the sale of a business as a going concern, if they are made from the seller to the buyer. Such assignments are excluded since they are normally regulated differently by national laws dealing with corporate buyouts. However, assignments made to an institution financing the sale (or between two or more entities for the purpose of debt restructuring or refinancing) are not excluded.

Assignments of "financial" receivables

47. Paragraph 2 excludes a number of practices for which the draft Convention (e.g. the provisions on representations, contractual limitations on assignment, set-off and priority) would not be well suited. Unlike the practices in articles 11, paragraph 3 and 12, paragraph 3 with respect to which the application of articles 11 and 12 only is excluded, practices are excluded in article 4, paragraph 2 from the scope of the draft Convention as a whole. The difference in the approach lies in the fact that the draft Convention would never apply to practices listed in article 4, paragraph 2, while the application of the draft Convention with respect to practices listed in articles 11, paragraph 3 and 12, paragraph 3 would depend on the existence of an anti-assignment agreement and on the effect given to such an agreement by the law governing it.

48. The criterion for the exclusion in subparagraph (a) is not the type of the asset being traded but the method of settlement used. In addition, not every regulated trading is excluded but trading under the auspices of a regulated exchange (e.g. stock exchange, securities and commodities exchange, foreign currency and precious metal exchange). As a result, the trading of securities, commodities, foreign currency or precious metals outside a regulated exchange (and outside netting arrangements excluded in subparagraph (b)) is not excluded (e.g., the factoring of proceeds from the sale of gold or other precious metals).

49. Subparagraph (b) excludes "financial contracts" governed by netting agreements (for comments on the relevant definitions, see paras. 72-75). In such financial transactions, it is inherent that any party may be debtor or creditor and, by definition, payments net against each other. As a result, if one payment is pulled out by way of an assignment, the credit risk situation on the basis of which a party entered into the transaction may change. A change in the risk exposure of a party could unravel the whole transaction or have a negative impact on the cost of credit, a result which would run counter to the overall objective of the draft Convention. In view

of the importance of such transactions for international financial markets and their volume, such a situation may create a systemic risk that may affect the financial system as a whole.

50. Practices governed by netting arrangements between two commercial enterprises other than financing institutions ("industrial netting") are not excluded. There is nothing in the draft Convention that would interfere with such practices. In addition, their exclusion could inadvertently result in excluding significant commercial transactions on the mere ground that the assignor had a netting arrangement with the debtor. The assignment of a receivable payable upon termination ("close-out") of a netting arrangement is not excluded either, since, in the case of such an assignment, there is no risk of upsetting the mutuality of obligations (see also articles 11, paragraph 3 (d) and 12, paragraph 4 (d)).

51. In subparagraph (c), receivables arising from deposit accounts are excluded. The reason is that certain provisions of the draft Convention (e.g. articles 5 (h), 11, 12, 19, 20 and 24) may upset the normal relationship between a financing institution and an account holder, and interfere with the extension of credit on the security of a pledge of the account.

52. The underlying reason for the exclusion in subparagraph (d) is the need to avoid interfering with the regulation of inter-bank payment systems (more than two parties) or agreements (two parties) and securities settlement systems (that normally involve more than two parties but may, in some countries, involve only two parties). Such systems are excluded in subparagraph (d) (and not in subparagraph (b)), since they operate within or outside netting agreements.

53. Assignments of receivables arising under a letter of credit or an independent guarantee are also excluded (see subparagraph (e)). Such assignments give rise to special considerations and are regulated by special legislative and non-legislative texts, including the United Nations Convention on Independent Guarantees and Standby Letters of Credit, the Uniform Customs and Practice for Documentary Credits (UCP500), the Uniform Rules for Demand Guarantees (URDG) and the Uniform Rules on Standby Practices (ISP98).

54. Subparagraph (f) is intended to address transactions with respect to investment securities that take place outside a regulated exchange (see subparagraph (a)) or a netting agreement (subparagraph (b)). The direct (by the owner) or indirect (by an intermediary) holding of paper or dematerialized securities is excluded, since it may generate receivables, such as the balance in a securities account or dividends from securities. Subparagraph (f) is also intended to exclude transactions made by physical delivery or by an entry into the books of an intermediary holding paper or dematerialized securities.

Assignments of real estate receivables

55. The main purpose of paragraph 3 is to ensure that the draft Convention does not disrupt national real estate markets. Subparagraph (a) is aimed at ensuring that the draft Convention would not apply to a conflict of priority between the holder of a right in real estate and the assignee of receivables arising from the sale or lease of, or secured by, real estate. Such a conflict may arise if a right in real estate is extended to receivables related to the real estate. For example, it is normal for a financier of a real estate acquisition or of a construction or an improvement of buildings to obtain a mortgage that gives the financier a right in future income derived from the real estate or from the buildings. The priority of the rights of such a financier is normally subject to the law of the country in which the real estate is located. However, if the right of the financier in the receivables is not derived from the right in real estate, the assignment of the receivables is not excluded. Otherwise, the mere existence of a mortgage could inadvertently result in excluding from the scope of the draft Convention significant receivables financing practices that are currently regulated appropriately by national assignment of receivables law.

56. Subparagraph (b) is intended to ensure that the draft Convention does not affect any statutory prohibitions existing with respect to the acquisition of rights in real estate by an assignee of receivables related to the real estate. As a result, if payment of the assigned receivable is secured by a mortgage, despite article 12, the assignee would not obtain that

mortgage if that mortgage was not transferable by law. Furthermore, subparagraph (b) is intended to supplement the protection afforded to holders of rights in real estate receivables in articles 9, paragraph 3 (statutory prohibitions), 12, paragraph 5 (form requirements) and 25, paragraph 1 (public policy).

Exclusions by declaration

57. In the interest of enhancing the acceptability of the draft Convention, paragraph 4, which appears within square brackets since it has not been adopted yet, gives States the option to exclude further practices, whether existing or future.

C. Chapter II
General provisions

Article 5
Definitions and rules of interpretation

For the purposes of this Convention:

(a) "Original contract" means the contract between the assignor and the debtor from which the assigned receivable arises;

(b) "Existing receivable" means a receivable that arises upon or before the conclusion of the contract of assignment and "future receivable" means a receivable that arises after the conclusion of the contract of assignment;

(c) "Writing" means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;

(d) "Notification of the assignment" means a communication in writing that reasonably identifies the assigned receivables and the assignee;

(e) "Insolvency administrator" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor's assets or affairs;

(f) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(g) "Priority" means the right of a party in preference to another party;

(h) A person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

(i) "Law" means the law in force in a State other than its rules of private international law;

(j) "Proceeds" means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

(k) "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

(l) "Netting agreement" means an agreement that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (l) (ii) of this article under two or more netting agreements;

(m) "Competing claimant" means:

(i) Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right in other property of the assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;

(ii) A creditor of the assignor; or

(iii) The insolvency administrator.

References

A/CN.9/420, paras. 52-60; A/CN.9/432, paras. 70-72, 94-105; A/CN.9/434, paras. 78-85, 109-114, 167 and 244; A/CN.9/445, paras. 180-190; A/CN.9/456, paras. 53-78; A/CN.9/466, paras. 25-31, 46-49 and 94-100; A/55/17, paras. 110-118 and 184; and A/CN.9/486, paras. 47, 54, 147 and 173.

Commentary

Original contract

58. The original contract, which is used as a point of reference in articles 5 (h), 17, 18, paragraph 1, 19, paragraph 1, 20, paragraph 1, 22, paragraph 2 (b) and 23, is the source of the assigned receivable. With the exception of those provisions that expressly state otherwise (e.g. articles 9-12 and 17-23), the draft Convention is not intended to affect the rights and obligations of the parties under the original contract.

Existing and future receivable

59. The terms "existing" and "future" receivable are referred to in articles 9 and 10 (it is understood that the singular includes the plural and vice versa). The distinction between an existing and a future receivable is based on the time of the conclusion of the original contract. A receivable arising under a contract, which has been concluded before or at the time of assignment, is considered to be an existing receivable, even though it does not become due until

a future date or is dependent upon counter-performance or some other future event. The definition covers the entire range of future receivables. It covers, in particular, conditional receivables (that might arise subject to a future event) and purely hypothetical receivables (that might arise from a future activity of the assignor; for a limitation introduced in article 9, see para. 83). While it is generally assumed that "conclusion of the contract" refers to the time when the parties reach a legally binding agreement and does not presuppose the performance of the contract, the exact meaning of this term is left to law applicable outside the draft Convention.

Writing

60. The term is referred to in articles 5 (d), 19, paragraphs 2 and 7, 21, paragraphs 1 and 3, 43, paragraphs 2 and 4, 46, paragraph 1 of the draft Convention and in article 5, paragraph 1 of the annex. Its definition includes other than paper-based means of communications that can perform the same functions as a paper communication (e.g. provide tangible evidence, serve as a warning to the parties with regard to the consequences or provide a legible communication, authentication and sufficient assurances as to its integrity). It is inspired by articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce and reflects the two distinct notions of "writing" and "signature" (for the meaning of the terms "accessible", "usable" and "subsequent reference", see the Guide to Enactment of the Model Law, para. 50).

61. It is assumed that the need for higher assurances as to the authenticity of communications should be assessed differently depending on the context in which the communication is made. Accordingly, the draft Convention requires a writing for the notification of the assignment (see article 5 (d)) and a writing signed by the debtor for the waiver of the debtor's defences (see article 21, paragraph 1). Writing is also required for declarations by States and for certain registration-related acts (see article 43, paragraphs 2 and 4 of the draft Convention and article 5, paragraph 1 of the annex).

Notification of the assignment

62. The term is used in articles 15, 16, 18, 19, 20, paragraph 2 and 22. A notification meets the requirements of the draft Convention if it is in writing and reasonably identifies the assigned receivables and the assignee (and it is in a language that is reasonably expected to inform the debtor, see article 18, paragraph 1). If a notification does not meet those requirements, it is not effective under the draft Convention. However, the question whether such a notification is effective under law applicable outside the draft Convention is subject to that law (as to the discharge of the debtor by payment to the person entitled to payment even under law applicable outside the draft Convention, see article 19, paragraph 8).

63. What is a reasonable description in each particular case is a matter to be determined in view of the circumstances. In general, it would not be necessary to state whether an outright assignment or an assignment by way of security is involved or to specifically identify the debtor or the amount. A general identification along the lines "all my receivables from my car business to X" or "all my receivables as against my clients in countries A, B and C to Y" would be reasonable. However, in the case of a partial assignment, the amount assigned may need to be specified in the notification (on partial assignments, see paras. 34 and 89; see also article 19, paragraph 6).

64. While the notification must reasonably identify the assignee for it to be an effective notification under the draft Convention, it does not need to identify the payee (i.e. the person to whom or for whose account or the address to which the debtor is to pay). Accordingly, a notification containing no payment instruction is effective under the draft Convention (see articles 15, paragraph 1, 18, paragraph 1 and 19, paragraph 2; see also para. 124 and comments on article 19, paragraph 2).

Insolvency administrator and insolvency proceeding

65. The term "insolvency administrator" is used in articles 24 of the draft Convention and articles 2, 7 and 9 of the annex. The term "insolvency proceeding" is used in article 25 of the draft Convention and articles 2, 7 and 9 of the annex. Their definitions have been inspired by

the definitions of "foreign proceeding" and "foreign administrator" contained in article 2 (a) and (d) of the UNCITRAL Model Law on Cross-Border Insolvency. They are also consistent with article 1, paragraph 1 and article 2 (a) and (b) of the European Union Regulation on Insolvency Proceedings. By referring to the purpose of a proceeding or to the function of a person, rather than using technical expressions that may have different meanings in different legal systems, the definitions are sufficiently broad to encompass a wide range of insolvency proceedings, including interim proceedings. This approach is intended to ensure that a Contracting State would not need to recognize a proceeding that is not an insolvency proceeding under the law of that State. It is also intended to ensure that a Contracting State would not deny recognition to a proceeding that is an insolvency proceeding under the law of that State.

Priority

66. The term "priority" is used in articles 16, 24, 25, paragraph 2, 26, 27, 31 and 43, paragraph 7, 45, paragraph 4 and 46, paragraph 4 of the draft Convention, as well as in articles 1, 2 and 6 to 9 of the annex. Priority under the draft Convention means that a party may satisfy its claim in preference to other claimants. No reference is made to payment, since the receivable may be satisfied by payment or in some other way (e.g. return of goods). Priority does not mean validity. It presupposes an assignment that is valid as between the assignor and the assignee (for the reasons why use of the term "effective" is preferred in article 9, see para. 85). Whether a claimant has a proprietary (*in rem*) rather than a personal (*ad personam*) right and whether an assignment is an outright assignment or an assignment by way of security are matters treated as being distinct from priority ("the characteristics of a right"; see article 24). Like priority, though, they are left, to the law of the assignor's location. Priority is a matter distinct from the discharge of the debtor as well. Under article 19, the debtor is discharged, even if payment is made to an assignee who does not have priority. Whether that assignee will retain the proceeds of payment is a matter of priority in proceeds to be resolved among the various claimants in accordance with the law governing priority (see article 24).

Location

67. This term is referred to in several provisions of the draft Convention (i.e. articles 1, paragraphs 1 (a) and 3, 3, 4, paragraph 4, 17, paragraph 2, 21, paragraph 1, 23 to 25, 31, 36, paragraph 3, 38, 40 and 41). The two main issues, however, in which the term "location" is referred to, are the scope of application and questions of priority. The definition is intended to strike a balance between flexibility and certainty. The place of business is a well-known term, widely used in UNCITRAL and other international legislative texts, and on which abundant case law exists. It is used to denote a place in which the professional activities of a person or an entity are conducted. For the purpose of the application of the law of a State, several places of business in one and the same State are considered to be one place of business. In order to ensure a sufficient degree of predictability of the application of the draft Convention with regard to the debtor, in the case of multiple places of business of the debtor, reference is made to the place with the closest connection to the original contract. If the assignor (or the assignee) has more than one place of business, "place of business" means the place of central administration. This rule is designed to ensure that priority issues are referred to a single jurisdiction and one in which any main insolvency proceeding is most likely to be opened.

68. Place of central administration is akin to the centre of main interests (a term used in the UNCITRAL Model Law on Cross-Border Insolvency), chief executive office or principal place of business. All those terms are understood as denoting the centre of management and control, the real business centre, from which in fact, not as a matter of form, the important activities of an entity are controlled and ultimate decisions at the highest level are actually made. In this regard, the place where most assets are located or books and records are kept is irrelevant. To the extent that the day-to-day management of the affairs and operations of an entity is conducted from a place other than the place of central administration, the place of central administration remains decisive. However, unlike the UNCITRAL Model Law, in which a rebuttable presumption is established that the centre of main interests is the place of registration (article 16, paragraph 3), the draft Convention does not introduce such a "safe harbour" rule. Unlike the UNCITRAL Model Law whose main focus is on insolvency, the draft Convention focuses mainly on the

advance planning in the financing of a solvent debtor and for that planning to be facilitated it is absolutely necessary to define location by reference to a single and easily determinable jurisdiction.

69. In most cases, the place of central administration would be easy to determine and would point to a single jurisdiction. In the exceptional situations in which that may not be the case, the parties would be left in no worse situation than they are to begin with and would need to ensure that their interest is effective and enforceable in each jurisdiction in which the assignor might possibly be located.

Law

70. The term "law" appears in the preamble and in articles 1, paragraph 2, 7, paragraph 2, 8, 12, paragraphs 1, 5 and 6, 21, 23 to 25, 28 to 32, 36 and 42, paragraph 2. The definition of "law" is intended to ensure that reference is made to the substantive law and not to the private international law rules of the applicable law. If "law" included the private international law rules of the applicable law, any matter could be referred to a law other than the substantive law applicable by virtue of the private international law rules of the forum ("*renvoi*"). Traditionally, private international law conventions exclude any form of *renvoi*. If the designation of the applicable law were to include the private international law rules of the law applicable, an element of uncertainty would be reintroduced. For example, the private international law rules of the assignor's jurisdiction could point to the law of a State which is not party to the draft Convention and which has a rule referring priority issues to the law governing the receivable. The result would be that the parties would lose all the benefits of certainty and predictability article 24 is designed to provide.

Proceeds

71. The term "proceeds" appears in articles 12, paragraph 1, 16, paragraph 1, 24 and 26. Its definition is intended to cover both proceeds of receivables and proceeds of proceeds (e.g. if the receivable is paid by way of a cheque, the cheque is "proceeds of the receivable" and cash received by the payee of the cheque is "proceeds of proceeds"). It is also intended to cover, proceeds in cash ("payment") and proceeds in kind ("other satisfaction"), whether received in total or partial satisfaction of the assigned receivable. In particular, it is intended to cover goods received in total or partial discharge of the assigned receivable but not returned goods (e.g. because they were defective and the sales contract was cancelled or because the sales contract allowed the buyer to return the goods after a trial period). However, as between the assignor and the assignee, the assignee has a right in returned goods (see article 16, paragraph 1).

Financial contract

72. The definition is used in article 4, paragraph 2 (b). It refers to derivative contracts (e.g. swaps or repurchase agreements) that share the common characteristic of creating payment obligations determined by the price of an underlying transaction. Such contracts are called derivative because they are derived from ordinary commercial contracts and settlement is not by actual performance of the commercial (sale or deposit) contract but by the payment of a difference derived from an actual asset and an actual price. Derivatives are usually transacted within a master netting agreement (e.g. the Master Netting Agreement prepared by the International Swaps and Derivatives Association ("ISDA")).

73. In a traditional interest-rate swap, a creditworthy entity borrowing money at a fixed interest rate exchanges that interest with a variable interest rate at which a less secure entity borrows a similar sum. As a result, a less creditworthy entity, for a fee, in effect borrows money at a fixed rate. No payment of capital occurs between the parties to the swap (that comes from the underlying loan transactions). Between such parties, only interest payments take place. In practice, the interest payments are offset against each other and only a net payment is made by the party with the larger payment due. This residual payment is a contractual right to a monetary sum, the assignment of which is not excluded from the scope of the draft Convention.

74. With the exception of interest-rate swaps, most derivative contracts relate to the difference between the agreed future price of an asset on a future date and the actual market price on that date. For example, in repurchase agreements one party sells a (usually fixed-interest) investment security (e.g. stocks or bonds) to another and simultaneously agrees to repurchase the investment security at a future date at an agreed price. That price includes allowance for the interest on the cash consideration and the accrued interest on the investment security. The payments are contingent upon the delivery or return of the investment security.

75. In "forward" transactions, parties agree to buy or sell an asset (e.g. foreign currency) for delivery on a specified future date at a specified price. In a "spot" transaction, the delivery date is a certain number of business days, usually two, after the contract date. In a "futures" contract, one party agrees to deliver to the other party on a specified future date ("the maturity date") a specified asset (e.g. a commodity, currency, a debt, equity security or basket of securities, a bank deposit or any other category of property) at a price agreed at the time of the contract and payable on the maturity date. Futures are usually performed by the payment of the difference between the price agreed upon at the time of the contract and the market price on the maturity date, and not by physical delivery and payment in full on that date. In options, the buyer has the right (but not the obligation) to acquire ("call option") or to sell ("put option") an asset in the future at a price fixed when the option contract is entered into.

Netting agreement

76. Netting arrangements are common practice in inter-bank payment and securities settlement systems, derivative and foreign currency transactions. They are implemented on the basis of standard contracts and legislation prepared by the relevant industry (e.g. the Master Netting Agreement prepared by the International Swaps and Derivatives Association ("ISDA") and the ISDA Model Netting Act, adopted so far by 21 States). Such arrangements involve the net settlement of payments due in the same currency and on the same date. They also involve set off (i.e. the discharge of reciprocal claims to the extent of the smaller claim) and netting (at its simplest, the ability to set off reciprocal claims in the case of the insolvency of a counter-party).

Competing claimant

77. The term competing claimant appears in articles 9, paragraph 4, 10, 24, 26, 31, 43, paragraph 7, 45, paragraph 4, and 46, paragraph 4. The definition is intended to ensure that all potential priority conflicts are covered, including conflicts between a domestic and a foreign assignee of domestic receivables, between an assignee and a creditor with an interest in other property extended to the receivables flowing from that property and between an assignee in an assignment made before and an assignee in an assignment made after the draft Convention enters into force. A creditor with an interest in goods, which is extended to receivables by agreement or by law, is treated as an assignee. As a result, a conflict with such a creditor would be subject to a type of a rule such as article 1, 6 or 8 of the annex.

Article 6
Party autonomy

Subject to article 21, the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

References

A/CN.9/432, paras. 33-38; A/CN.9/434, paras. 35-41; A/CN.9/445, paras. 191-194; A/CN.9/456, paras. 79 and 80; and A/55/17, paras. 119-121.

Commentary

78. Article 6, which is modelled on article 6 of the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980 ("the United Nations Sales Convention"), provides broad recognition of the principle of party autonomy. Unlike article 6 of the United Nations Sales Convention, however, article 6 does not allow parties to vary or derogate from provisions that affect the legal position of third parties, or to exclude the draft Convention as a whole. The reason for this different approach is that, unlike the United Nations Sales Convention, the draft Convention deals mainly with the proprietary effects of an assignment and may, therefore, have an impact on the legal position of third parties. Allowing parties to an agreement to affect the rights and obligations of third parties would not only go beyond any acceptable notion of party autonomy but would also introduce an undesirable degree of uncertainty and could thus frustrate the main objectives of the draft Convention. Article 6 is intended to apply to agreements between the assignor and the assignee, between the assignor and the debtor or between the assignee and the debtor as long as they vary or derogate from provisions of the draft Convention and not of law applicable outside the draft Convention. The reference to article 21 introduces a further limitation, namely that the assignor and the debtor may not agree to waive the defences mentioned in article 21, paragraph 2 (however, waiver of defences agreed upon between the between the assignee and the debtor are not covered by article 21).

Article 7
Principles of interpretation

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

References

A/CN.9/432, paras. 76-81; A/CN.9/434, paras. 100 and 101; A/CN.9/445, paras. 199 and 200; A/CN.9/456, paras. 82-85; A/55/17, paras. 122-124; and A/CN.9/486, para. 74.

Commentary

79. Article 7, inspired by article 7 of the United Nations Sales Convention, deals with the interpretation of and the filling of gaps in the draft Convention. With regard to the interpretation of the draft Convention, article 7, paragraph 1 refers to four principles, namely, the object and purpose of the draft Convention set forth in the preamble, the international character of the text, uniformity and good faith in international trade. With the exception of the reference to the preamble which is aimed at facilitating the process of interpretation and filling gaps in the draft Convention, these principles are common to most UNCITRAL texts and should be read in the same way as similar language in those texts. The reference to the international character or source of the text is intended to assist a court in avoiding an interpretation of the draft Convention on the basis of notions of national law. The need to preserve uniformity can be served only if courts or arbitral tribunals apply the draft Convention on its merits and have regard to decisions of courts or tribunals in other countries. The Case Law on UNCITRAL Texts (CLOUT), a system of reporting case law on UNCITRAL texts, has been established by the Commission exactly with the need to preserve uniformity in mind. CLOUT is available in paper form in the six official languages of the United Nations and through the UNCITRAL home page on the World Wide Web (http://www.uncitral.org) in English, French and Spanish

(depending on the resources available, the other language versions will also be made available in the future).

80. The reference to good faith relates only to the interpretation of the draft Convention. If the principle of good faith is applied to the conduct of the parties, caution should be exercised. This principle may appropriately be applied to the contractual relationship between the assignor and the assignee or between the assignor and the debtor. However, if applied to the relationship between the assignee and the debtor or the assignee and any other claimant, it could undermine the certainty of the draft Convention. For example, according to the principle of good faith prevailing in the forum State, the debtor, who might have paid the assignee after notification, may have to pay again if the debtor knew (but had no notification) of a previous assignment. Similarly, application of the principle of good faith to the assignee-third party relationship might inadvertently result in the assignee with priority under the registration provisions of the law of the assignor's location losing priority if it knew or ought to have known of another person's rights acquired before registration (although there was no information registered about those rights).

81. As to gap-filling, a distinction is drawn between matters that fall within the scope of the draft Convention but are not expressly settled in it and matters outside the scope of the draft Convention. The latter are left to the law applicable outside the draft Convention by virtue of the private international law rules of the forum (or, if the forum is in a Contracting State, of the draft Convention). Gaps with regard to matters within the scope of the draft Convention but not expressly settled are to be filled through an application of the general principles on which the draft Convention is based.[13] Such principles are to be derived from the preamble or specific provisions of the draft Convention (e.g. the principle of facilitation of increased access to lower-cost credit and the principle of debtor protection). If there is no principle that can be applied to a particular issue, the gap is to be filled in accordance with the law applicable by virtue of private international law rules. Gaps in the private international law provisions of the draft Convention are to be filled in accordance with the private international law principles underlying the draft Convention. In the absence of such principles, such gaps should be filled in accordance with the private international law rules of the forum.

D. Chapter III
Effects of assignment

Commentary

General comments

82. Chapter III settles issues of formal and material validity of an assignment under the draft Convention (for the use of the term "effectiveness", see para. 85). Formal validity is addressed by way of a private international law rule. Material validity is addressed by way of substantive law rules. However, not all matters of material validity are addressed. Matters that are not addressed and are left to law outside the draft Convention include statutory limitations on assignment, other than those dealt with in articles 9, 11 and 12, and issues relating to priority between an assignee and a competing claimant, as well as to capacity and authority.

[13] A number of matters that are not governed by the draft Convention but are left to law applicable outside the draft Convention by virtue of private international law rules are identified in the comments to various articles (see, for example, paras. 21, 22, 24, 25, 42-54, 66, 82, 83, 85, 105 and 111).

Article 8
Form of assignment

An assignment is valid as to form if it meets the form requirements, if any form requirements exist, of either the law of the State in which the assignor is located or any other law applicable by virtue of the rules of private international law.

References

A/CN.9/420, paras. 75-79; A/CN.9/432, paras. 82-86; A/CN.9/434, paras. 102-106; A/CN.9/445, paras. 204-210; A/CN.9/456, paras. 86-92; A/CN.9/466, paras. paras. 101-103; A/55/17, paras. 125-129 and A/CN.9/486, paras. 76 and 174.

Commentary

83. The main objective of article 8 is to provide assignees the certainty that, if they meet the form requirements of a single jurisdiction, their assignments (including the contract of assignment) would be valid as to form. In order to achieve this objective, article 8 refers form to the law of the assignor's location (i.e. a single, easily determinable jurisdiction even in the case of bulk assignments or assignments of future receivables). However, article 8, does not introduce a single applicable law so as to avoid interfering with current theories as to the law applicable to the form of the contract of assignment. Whether there is any form requirement or what form means exactly (i.e. writing, notification of the debtor, registration, notarial act or payment of a stamp duty) is left to law applicable outside the draft Convention.

Article 9
Effectiveness of assignments, bulk assignments, assignments of future receivables and partial assignments

1. An assignment of one or more existing or future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee, as well as against the debtor, whether the receivables are described:

(a) Individually as receivables to which the assignment relates; or

(b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates.

2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

3. Except as provided in paragraph 1 of this article and in articles 11 and 12, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law.

4. An assignment of a receivable is not ineffective against, and the right of an assignee may not be denied priority with respect to the right of, a competing claimant, solely because law other than this Convention does not generally recognize an assignment described in paragraph 1 of this article.

References

A/CN.9/420, paras. 45-60; A/CN.9/432, paras. 93-112 and 254-258; A/CN.9/434, paras. 122 and 124-127; A/CN.9/445, paras. 211-214; A/CN.9/456, paras. 93-97; and A/55/17, paras. 130-135.

Commentary

84. Assignments of future receivables, bulk assignments and assignments of parts of or undivided interests in receivables are at the heart of significant financing practices (e.g. asset-based financing, factoring, securitization, project financing, loan syndication and participation). Yet their effectiveness as a matter of property law is not recognized in all legal systems. Article 9 is intended to validate such assignments. For reasons of consistency, article 9 validates also the assignment of a single existing receivable.

Effectiveness

85. The term "effective" is intended to reflect the proprietary effects of an assignment, the transfer of property rights in receivables. It was preferred since the term "valid" could not have that effect and, in any case, is not universally understood in the same way. The exact meaning of such effectiveness depends on whether an outright assignment or an assignment by way of security is involved. This matter is left to law applicable outside the draft Convention (see articles 5 (m) and 24, paragraph 2 (b)). In any case, if an assignment is effective, the assignee may claim and, if the debtor does not raise the absence of notification as a defence and pays, retain payment. Whether the debtor is discharged is a matter for article 19. Whether the person who received payment may retain it is a matter for article 24, since article 9 limits the effect of the assignment to the relationship between the assignor and the assignee and to the relationship between the assignee and the debtor. The reason for this approach is that effectiveness as against third parties touches upon issues of priority and the draft Convention treats such issues as distinct issues, subjecting them to the law of the assignor's location (see article 24). This means, for example, that article 9 would not validate the first assignment in time while invalidating any further assignment of the same receivables by the same assignor. It also means that application of article 9 would not result in the assignee prevailing over an insolvency administrator on the sole ground that the assignment took place before the effective date of the insolvency proceeding, even though the receivables arose or were earned after commencement of the insolvency proceeding.

86. In order to reflect this interplay between effectiveness (as a condition for priority) and priority, article 9, paragraph 1 states explicitly that it deals with effectiveness "as between the assignor and the assignee, as well as against the debtor". However, this approach may inadvertently result in leaving the effectiveness of the assignments referred to in paragraph 1 altogether to the law applicable to priority. For that reason, article 9, paragraph 4 provides that an assignment, which is effective under article 9, paragraph 1, may not be invalidated or denied priority merely because law outside the draft Convention does not recognize it as a matter of general commercial law. For the same reason, article 24 states that it does not deal with matters dealt with elsewhere in the draft Convention.

"Existing or future receivables"

87. The terms are defined in article 5 (b) by reference to the time of the conclusion of the original contract. All future receivables are to be covered, including conditional receivables and purely hypothetical receivables (see para. 59). With a view to protecting the interests of the assignor, paragraph 1 introduces an element of specificity (receivables have to be identifiable at the time they arise).

"One or more"

88. While the focus of the draft Convention is on the bulk assignment of a large volume of low-value receivables (e.g. factoring of trade receivables or securitization of consumer receivables), the assignment of single, large-value receivables (e.g. loan syndication and participation) is also covered. The rule is that, as a matter of substantive validity (formal validity is left to the law applicable under article 8), an agreement between the assignor and the assignee, as defined in article 2, is sufficient for the transfer of property rights in receivables.

"Parts of or undivided interests in receivables"

89. Monetary claims can always be divided and assigned in part. Such partial assignments are not rare in practice and there is no reason to invalidate them as long as the legitimate interests of the debtor are protected (see article 19, paragraph 6). Assignments of undivided interests are involved in significant transactions. For example, in securitization, a special purpose vehicle ("SPV") may assign to investors undivided interests in the receivables purchased from their originator as security for the SPV's obligations to investors. In loan syndication and participation, the leading lender may assign undivided interests in the loan to a number of other lenders.

"Described"

90. The term "described" is intended to establish a standard lower than the standard that would be established by the term "specified". Under this standard, a generic description of the receivable, without any specification of the identity of the debtor or the amount of the receivable, would be sufficient to encompass even future receivables (e.g. "all my receivables from my car business").

"Individually"/"in any other manner"

91. These words are intended to ensure that an assignment of existing and future receivables is effective, whether the receivables are described one by one or in any other manner that is sufficient to relate the receivables to the assignment.

Time of identification of receivables

92. Existing receivables are to be identified as receivables relating to the assignment at the time of the assignment. Future receivables should be identifiable at the time they arise (which is, by definition, after the time of the assignment). As a result of article 7, which enshrines party autonomy, the assignor and the assignee may agree on the time when future receivables should be identifiable to the assignment, as long as they do not affect the rights of the debtor and other third parties.

Master agreements

93. With a view to expediting the lending process and reducing transaction costs, paragraph 2, in effect, provides that a master agreement is sufficient to transfer rights in a pool of future receivables. If a new document were to be required each time a new receivable arose, the costs of administering a lending programme would increase considerably and the time needed to obtain properly executed documents and to review those documents would slow down the lending process to the detriment of the assignor. Under paragraph 2, a master agreement is sufficient to transfer a pool of future receivables, while, under article 10, a future receivable is deemed to be transferred at the time of the conclusion of the contract of assignment.

Statutory assignability

94. In validating the assignments to which it refers, article 9, paragraph 1 may set aside statutory prohibitions existing in national law with respect to such assignments. While setting aside such statutory limitations, the draft Convention is not intended to interfere with national policies (see para. 21). Such policies are aimed at protecting the assignor from alienating its future property and potentially depriving itself of means of subsistence (as, for example, in the case of limitations to the assignment of wage claims or retirement annuities). They are often articulated by means of a requirement for specificity, which may not be possible in the case of an assignment of future receivables or a bulk assignment. With a view to establishing a balance between the need to validate assignments and the need to protect assignors, article 9, paragraph 1 requires that the receivables be identifiable when they arise (i.e. when the original contract is concluded) as receivables to which the assignment relates. The draft Convention avoids any other limitation to the assignor's right to transfer future receivables, since it does not give priority to one creditor over another, but leaves matters of priority to national law. National policies reflected in statutory prohibitions may also be aimed at protecting the debtor (as, for

example, in the case of limitations to the assignment of sovereign or consumer receivables). The draft Convention does not interfere with such national policies either. It establishes a sufficiently high standard of debtor protection (e.g. in the case of partial assignments, the debtor may treat a notification as ineffective; see article 19, paragraph 6) and requires that the debtor be located in a Contracting State (see article 1, paragraph 3).

95. The draft Convention does not affect any statutory limitations other than those referred to in article 9, paragraph 1 (e.g. statutory limitations as to consumer receivables, sovereign receivables, wages or pensions). This result is implicit in article 11. In addition, it is explicitly addressed in article 9, paragraph 3 so as to avoid creating any ambiguity as to whether the matter is governed by the draft Convention but not explicitly settled or not governed at all (for the difference, see article 7, paragraph 2).

Article 10
Time of assignment

Without prejudice to the right of a competing claimant, an existing receivable is transferred and a future receivable is deemed to be transferred at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time.

References

A/CN.9/420, paras. 51 and 57; A/CN.9/432, paras. 109-112 and 254-258; A/CN.9/434, paras. 107, 108 and 115-121; A/CN.9/445, paras. 221-226; A/CN.9/456, paras. 76-78 and 98-103; and A/55/17, paras. 136.-138.

Commentary

96. The rule under article 10 is that an assignment is effective, as between the assignor and the assignee, as well as against the debtor, at the time when the contract of assignment is concluded. However, article 10 is not intended to prejudice the rights of third parties and operate as a priority rule, since priority issues are left to the law of the assignor's jurisdiction. In particular, article 10 is not intended to interfere with domestic insolvency law, for example, with respect to receivables arising, becoming due or being earned after the commencement of the insolvency proceeding.

97. While this approach is obvious with regard to receivables existing at the time they are assigned, a legal fiction is created with regard to future receivables (i.e. receivables arising from contracts not in existence at the time of the assignment). In practice, the assignee would acquire rights in future receivables only if they are in fact created, but, in legal terms, the time of transfer would go back to the time of the conclusion of the contract of assignment.

98. Article 10 also recognizes and, at the same time, limits the right of the assignor and the assignee to specify the time as of which the assignment is effective. Parties may agree as to the time of a transfer but that time may not be earlier than the time of the conclusion of the contract of assignment. This approach is in line with the principle of party autonomy enshrined in article 6, since an agreement setting an earlier time of assignment could affect the order of priority between several claimants. However, neither article 6 nor article 10 precludes the parties from agreeing to antedate the coming into force of their mutual contractual obligations.

Article 11
Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

3. This article applies only to assignments of receivables:

(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

References

A/CN.9/420, paras. 61-68; A/CN.9/432, paras. 113-126; A/CN.9/434, paras. 128-137; A/CN.9/445, paras. 49-51 and 227-231; A/CN.9/447, paras. 148-152; A/CN.9/455, paras. 47-51; A/CN.9/456, paras. 104-116; A/CN.9/466, paras. 104-106; and A/55/17, paras. 139-151.

Commentary

The rule

99. Under article 11, which is inspired by article 6 of the Ottawa Convention, both the contractual limitation on assignment and the assignment are effective. The question whether there is any liability for breach of contract is left to law applicable outside the draft Convention. However, if there is any such liability, under article 11, paragraph 2, the debtor is not entitled to terminate the original contract on the sole ground that the assignor violated a contractual limitation. Furthermore, any liability of the assignor is not extended to the assignee and cannot be based solely on the assignee's knowledge of the contractual limitation (there needs to be, for example, also malicious interference with advantageous contractual relations for tortious liability to be established). Other rights that the debtor may have under law applicable outside the draft Convention such as, for example, the right to compensatory damages are not affected either. This approach is consistent with the overall objectives of the draft Convention, since the risk of the contract being avoided or the assignee being held liable for breach of a contractual limitation on assignment by the assignor could in itself have a negative impact on the cost of credit. It is also consistent with the principle that the assignment is effective even if it is made in violation of an anti-assignment clause (see articles 11, paragraph 1 and 20, paragraph 3). In addition, this approach is consistent with the principle that a modification of the original contract (which includes also contract termination), is not allowed after notification of the debtor without the consent of the assignee (see article 22, paragraph 2).

100. Article 11 is based on the assumption that the assignee should not have to examine the documentation of each receivable, since this process would be costly in a bulk assignment and impossible in an assignment of future receivables. This approach is consistent with the market economy principles and the principle against restraints on alienation of property. It also takes into account that an economy in which receivables are freely transferable yields substantial benefits to debtors. The cost savings achieved for creditors through the free transferability of their receivables can be passed along to debtors in the form of lower costs for goods and services or lower cost for credit. On balance, it is more beneficial for everyone to facilitate the assignment of receivables and to reduce transaction costs rather than to ensure that the debtor would not have to pay a person other than the original creditor. In addition, the overall

objectives of the draft Convention could not be achieved without some adjustments in national legislation that would be aimed at accommodating modern commercial practices.

Substantive and territorial scope

101. Article 11 applies to contractual limitations, whether contained in the original contract or other agreement between the assignor and the debtor or in the initial or any subsequent assignment contract. It is also intended to apply to any contractual clauses limiting the assignment of receivables (e.g. by making it subject to the debtor's consent) and not only to clauses prohibiting assignment. It does not apply to statutory limitations to assignment or to limitations relating to the assignment of rights other than receivables (e.g. confidentiality clauses). As a result, if an assignment is made in violation of a statutory limitation or a confidentiality clause, article 11 does not apply to validate such an assignment or limit any liability existing under law applicable outside the draft Convention.

102. Paragraph 3 is intended to limit the scope of application of article 11 to assignments of trade receivables. However, it is formulated in such a broad way so as to encompass a wide variety of receivables, including consumer receivables and sovereign receivables. Included are receivables arising from the sale or lease of goods and real estate, from the sale or license of intangible property, such as intellectual, industrial or other property or information, and from the supply of construction or services. In order to avoid bringing back into the scope of the draft Convention financial receivables excluded in article 4, paragraph 3 explicitly provides that it does not apply to receivables arising from financial services. Subparagraphs (c) and (d) make it clear, however, that article 11 is to apply to the assignment of certain financial-service receivables. In subparagraph (d), reference is made only to multilateral netting arrangements so as to avoid excluding the application of article 11 in the case of assignments of trade receivables just because the assignor and the debtor had a netting arrangement.

103. Article 11 applies to assignments of receivables owed by consumer debtors. It is not intended, however, to override consumer-protection legislation (although, in practice, with few exceptions, consumers do not have the bargaining power to include such limitations in their contracts: for consumer receivables and consumer protection, see paras. 36 and 132). In any case, consumers would either not even be notified of any assignment or would be notified and asked to continue paying to the same bank account or post office box. In such a case, a debtor concerned about losing rights of set-off that may arise from contracts unrelated to the original contract could discontinue its relationship with the assignee.

104. Article 11 would also apply to assignments of receivables owed by sovereign debtors. However, under article 11, the State in which the sovereign debtor is located may make a reservation as to the application of article 11. Whether an assignment is effective as against a sovereign debtor in such a case would be left to law applicable outside the draft Convention. The effectiveness of contractual limitations in assignments other than those mentioned in paragraph 3 is left to law outside the draft Convention. If that law gives effect to contractual limitations, the assignment would be invalid and the draft Convention would not apply. If that law gives no effect to such contractual limitations, the assignment could be valid and the draft Convention could apply.

Article 12
Transfer of security rights

1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.

2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the

right securing payment of the assigned receivable.

3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

4. Paragraphs 2 and 3 of this article apply only to assignments of receivables:

(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

References

A/CN.9/420, paras. 69-74; A/CN.9/432, paras. 127-130; A/CN.9/445, paras. 232-235; A/CN.9/434, paras. 138-147; A/CN.9/456, paras. 117-126; and A/55/17, paras. 153-154.

Commentary

Accessory and independent rights

105. Paragraph 1 reflects the generally accepted principle that accessory security rights (e.g. a suretyship, pledge or mortgage) are transferred automatically with the principal obligation, while independent security rights (e.g. an independent guarantee or a standby letter of credit) are transferable only with a new act of transfer. A general expression (i.e. "right securing payment") is used in order to ensure that rights that may not be security rights, for example, rights arising from independent guarantees and standby letters of credit, would be covered. The question of the accessory or independent character of the right and the substantive or procedural requirements to be met for the creation of such a right are left to the law governing that right. In view of the wide range of rights covered by article 12 and the divergences existing among the various legal systems in this regard, article 12 does not attempt to specify the law applicable to such rights.

106. Paragraph 1 also creates an obligation for the assignor to transfer to the assignee any independent right securing payment of the assigned receivables as well as the proceeds of such a right. As a result, if an independent right and its proceeds are assignable (by law or by agreement), the assignee will be able to obtain them. If such rights are not assignable or not assigned for any reason, the assignee will have a personal claim against the assignor. Under article 6, the assignor and the assignee may agree that a right is not transferred to the assignee. Such an agreement may reflect the lack of willingness on the part of the assignee to accept the responsibility and the cost involved in the maintenance and safekeeping of collateral (e.g.

taxation and insurance costs in the case of immovable property or storage and insurance costs in the case of equipment).

Contractual limitations

107. Paragraph 2 is intended to ensure that any limitation agreed upon between the assignor and the debtor or other person granting a security right does not invalidate the assignment of such a right. Under paragraph 3, any liability that the assignor may have for breach of contract, under law applicable outside the draft Convention, is not affected but is not extended to the assignee (this approach is consistent with the approach taken in article 11). Paragraph 4 introduces in article 12 the scope limitations of article 11, paragraph 3. The underlying policy is that, with regard to limitations on assignment, security rights should be treated in the same way as receivables, since often the value relied upon by the assignee lies in the security right and not in the receivable itself. However, a limitation included in a contract with a sovereign third-party guarantor located in a State that has made a declaration under article 40 would render the assignment ineffective but only as against the sovereign third-party guarantor.

Possessory rights

108. According to paragraph 5, if the transfer of a security right involves the transfer of possession of the collateral and such transfer causes loss or prejudice to the debtor or the person granting the right, any liability that may exist under law applicable outside the draft Convention is not affected. Paragraph 5 envisages, for example, a transfer of pledged shares that might empower a foreign assignee to exercise the rights of a shareholder to the detriment of the debtor or any other person who might have pledged the shares.

Form requirements

109. Paragraph 6 makes clear that, like the form of an assignment of receivables, the form of transfer of a security right is left to law applicable outside the draft Convention. Accordingly, a notarized document and registration may be necessary for the effective transfer of a mortgage, while delivery of possession or registration may be required for the transfer of a pledge.

E. Chapter IV
Rights, obligations and defences

1. Section I
Assignor and assignee

Commentary

Purpose of section I

110. Unlike the other provisions of the draft Convention that deal mainly with the proprietary aspects of assignment (and with the exception of article 29), the provisions contained in this section deal with contractual issues. The usefulness of these provisions lies in the fact that they recognize party autonomy, a principle enshrined in a general way in article 6, and provide default rules applicable in the absence of an agreement between the assignor and the assignee. Such default provisions offer important benefits. They reduce transaction costs by eliminating the need for parties to replicate in their contract standard terms and conditions, in particular with respect to risk allocation. They also reduce dispute resolution costs by providing a clear-cut rule for both the courts and the parties in the event the parties have not addressed a particular issue. Furthermore, they perform a useful educational function by offering a checklist of matters for parties to address at the time of the initial contract negotiations. Most significantly, they enhance uniformity and certainty by reducing the need for courts to look to national solutions offered by the law applicable to the contract. However, the role of the law applicable to the contract is not wholly eliminated in section I of chapter IV. The effect of mistake, fraud or

illegality on the validity of the contract is left to the law governing the contract, as are remedies available for breach of contract (in so far as they are not subject to the law of the forum as procedural matters).

Article 13
Rights and obligations of the assignor and the assignee

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have implicitly made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or the assignment of the particular category of receivables.

References

A/CN.9/432, paras. 131-144; A/CN.9/434, paras. 148-151; CN.9/447, paras. 17-24; ACN.9/456, paras. 127 and 128; and A/55/17, paras. 158-161 and 184.

Commentary

111. The primary purpose of article 13 is to restate in more specific terms than article 6 the principle of party autonomy. The assignor and the assignee are free to structure their mutual rights and obligations so as to meet their particular needs. They are also free to incorporate into their agreement any rules or conditions by referring to them, rather than reproducing them in their agreement. The conditions, under which the parties may exercise their freedom, and the relevant legal consequences are left to the law governing their agreement.

112. In line with article 9 of the United Nations Sales Convention, article 13 also states in paragraphs 2 and 3 a principle that is recognized in all legal systems, namely, that trade usages agreed upon and practices established by parties in their dealings are binding. Paragraph 2 draws a clear distinction between trade usages existing beyond any agreement of the parties and practices established by certain parties in their dealings. Because of their nature, trade usages are binding if they are specifically agreed upon, while trade practices are binding unless specifically otherwise agreed since they presuppose, at least, an implicit agreement. Trade usages and practices may produce rights and obligations for the assignor and the assignee. However, they cannot bind third parties, such as the debtor or creditors of the assignor. They cannot bind subsequent assignors or assignees either (however, representations that are flowing from trade usages and are given to the initial assignee may benefit subsequent assignees; see para. 116). All those parties would not necessarily be aware of usages agreed upon by, and practices established between, the initial assignor and the initial assignee.

113. Paragraph 3 defines the scope of the matters covered by an international usage. Under paragraph 3, international usages bind only the parties to international assignments. Such a limitation is not necessary in article 9 of the United Nations Sales Convention since this Convention applies only to international transactions. It is, however, necessary in article 13 in view of the fact that the draft Convention may apply to domestic assignments of international receivables. In addition, under paragraph 3, as under article 9, paragraph 2 of the United Nations Sales Convention, usages are applicable only to the particular type of assignment or to the assignment of the particular type of receivables. This means that an international factoring usage would apply to an assignment in an international factoring but not to an assignment in a securitization transaction. However, unlike article 9, paragraph 2 of the United Nations Sales Convention, paragraph 3 does not refer to the subjective, actual or constructive knowledge of the parties but only to the objective requirements that the usages must be widely known and

regularly observed. While such a reference to the subjective knowledge of the parties might be useful in a two-party relationship, it could cause uncertainty in an assignment relationship.

Article 14
Representations of the assignor

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion of the contract of assignment that:

(a) The assignor has the right to assign the receivable;

(b) The assignor has not previously assigned the receivable to another assignee; and

(c) The debtor does not and will not have any defences or rights of set-off.

2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the ability to pay.

References

A/CN.9/420, paras. 80-88; A/CN.9/432, paras. 145-158; A/CN.9/434, paras. 152-161; A/CN.9/447, paras. 25-40; A/CN.9/456, paras. 129 and 130; and A/55/17, paras. 162-163.

Commentary

Party autonomy/default rules

114. Representations made by the assignor are intended to clarify the risk allocation between the assignor and the assignee. Because of their purpose, representations constitute a significant factor in the assignee's determination of the amount of credit to be made available to the assignor and the cost of credit. For the same reason, representations are highly negotiated and explicitly settled between the assignor and the assignee. Recognizing this reality, article 14 embodies the principle of party autonomy with regard to representations of the assignor. Such representations may stem from the financing contract, the contract of assignment (if it is a separate contract) or any other contract between the assignor and the assignee. In accordance with article 13, paragraphs 2 and 3, they may also stem from trade usages and practices. Article 14 allows parties to modify the representations, whether explicitly or implicitly.

115. In addition to recognizing the principle of party autonomy, article 14 is intended to set forth a default rule allocating risks between the assignor and the assignee in the absence of an agreement of the parties as to this matter. In the allocation of risks, the overall aim of article 14 is to establish a balance between the need for fairness and the need to facilitate increased access to lower-cost credit. Article 14 is consistent with normal practice in which the assignor guarantees the existence of the assigned receivable but not the solvency of the debtor. If the parties have not agreed on representations, in the absence of a rule along the lines of article 14, the risk of non-payment would be higher. This situation could defeat a transaction (if the risk is too high) or, at least, reduce the amount of credit offered and raise the cost of credit. Furthermore, to the extent that the assignee has to bear a certain risk, the assignor's goods or services would be more expensive or even inaccessible to the debtor.

Representations as to the "existence" or assignability of a receivable

116. Under paragraph 1, the assignor represents that it has the right to assign the receivable, that it has not assigned it already and that the debtor does and will not have any defences. In view of the need for the assignee to be able to estimate the risk involved in a transaction before extending credit, paragraph 1 provides that representations have to be made, and take effect, at the time of the conclusion of the contract of assignment. With respect to future receivables, representations are deemed to be made at the time of the assignment and take effect as of that

time if they actually arise. Such representations are considered as being given not only to the immediate assignee but also to any subsequent assignee. As a result, any subsequent assignee may turn against the assignor for breach of representations. If representations were considered as being undertaken only as against the immediate assignee, any subsequent assignee would have recourse only against its immediate assignor, a process that would increase the risk and thus the cost of transactions involving subsequent assignments.

117. The assignor is in violation of the representation as to its right to assign, introduced in subparagraph (a), if it does not have the capacity or the authority to act, or if there is any statutory limitation on assignment. This result is justified by the fact that the assignor is in a better position to know whether it has the right to assign. However, the assignor is not liable towards the assignee for breach of representations if the original contract between the assignor and the debtor contains a limitation on assignment. Subparagraph (a) contains no explicit reference to that rule, since it is implicit in article 11, under which the assignment is effective even if it is in breach of an agreement limiting assignment (see also article 20, paragraph 3). The representation, contained in subparagraph (b), that the assignor has not already assigned the receivable is aimed at holding the assignor accountable to the assignee if, as a result of a previous assignment by the assignor, the assignee does not have priority. This result may occur if the assignee has no objective way of determining whether a previous assignment has occurred. Subparagraph (b), however, does not require the assignor to represent that it will not assign the receivables to another assignee after the first assignment. Such a representation would run counter to modern financing practice in which the right of the assignor to offer to different lenders parts of or an undivided interest in the same receivables as security for obtaining credit is essential.

118. Subparagraph (c) places on the assignor the risk of hidden defences or rights of set-off of the debtor that may defeat in whole or in part the assignee's claim. This provision is premised on the assumption that, by performing its contract with the debtor properly, the assignor will be able to preclude such defences from arising. In particular in the context of sales contracts with service and maintenance elements, such an approach would result in a greater degree of accountability of the assignor for performing properly its contract with the debtor. The provision is also based on the assumption that, in any case, the assignor will be in a better position to know whether the contract will be properly performed, even if the assignor is just the seller of goods manufactured by a third person. However, there is no need for the assignor to have actual knowledge of any defences. Furthermore, subparagraph (c) is premised on the assumption that placing on the assignor the risk of hidden defences normally has a beneficial impact on the cost of credit. Subparagraph (c) has a wide scope, encompassing defences and rights of set-off whether they have a contractual or non-contractual source and whether they relate to existing or to future receivables. It also covers rights of set-off, whether they arise from the original or any related contract or from contracts unrelated to the original contract, with the exception of rights of set-off from unrelated contracts that become available after notification (see article 20, paragraph 2). With regard to representations relating to the absence of defences against future receivables assigned in bulk by way of security, the representation contained in subparagraph (c) properly reflects current practice. According to such practice, assignors normally receive credit only in the amount of those receivables that are not likely to be subject to defences, while they have to take back the receivables that were not paid by the debtor ("recourse financing").

Representations as to the solvency of the debtor

119. Paragraph 2 reflects the generally accepted principle that the assignor does not guarantee the solvency of the debtor. As a result, the risk of debtor default is on the assignee, a fact that the assignee takes into account in determining whether to extend credit and on what conditions. Recognizing the right of the parties to financing transactions to agree on a different risk allocation, paragraph 2 allows the assignor and the assignee to agree otherwise. Such an agreement may be implicit or explicit. The question of what constitutes an implicit agreement is left to the applicable contract interpretation rules.

Breach of representations

120. The draft Convention contains no specific rules on breach of representations since matters relating to the underlying contract are beyond the scope of the draft Convention.

Article 15
Right to notify the debtor

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and payment instructions, but after notification has been sent only the assignee may send such an instruction.

2. Notification of the assignment or payment instructions sent in breach of any agreement referred to in paragraph 1 of this article are not ineffective for the purposes of article 19 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

References

A/CN.9/420, paras. 89-94 and 119-122; A/CN.9/432, paras. 159-164 and 175; A/CN.9/434, paras. 162-165; A/CN.9/447, paras. 41-47; A/CN.9/456, paras. 131-144 and 193; A/CN.9/466, paras. 116 and 117; and A/55/17, paras. 164-165.

Commentary

Independent right of the assignee to notify the debtor and to request payment

121. The main objective of article 15 is to recognize the right of the assignee to notify the debtor and to request payment, even without the co-operation or the authorization of the assignor. It is not intended to define notification (see article 5 (d)) or to address the conditions for a notification to be effective as against the debtor (see article 18) or the legal consequences of notification (see articles 19, 20 and 22). Granting the assignee an autonomous right to notify the debtor is considered important, in particular since the assignor might be unwilling or, in the case of insolvency, unable to cooperate with the assignee. Allowing the assignee to notify the debtor independently of the assignor would not give an undue preference to the assignee in the case of insolvency of the assignor. That matter is left to the law governing priority. If, under that law, priority is based on the time of notification, an assignee cannot obtain priority over the creditors of the assignor or the insolvency administrator. In such a case, priority is obtained only if notification takes place before the commencement of an insolvency proceeding and on the condition that the assignment does not constitute a fraudulent or preferential transfer.

122. Article 15 is in particular intended to recognize practices in which it is normal for the assignor to send a bill to the debtor requesting payment and notifying the debtor about the assignment (e.g. factoring). At the same time, article 15 does not ignore non-notification practices (see para. 123). The protection of the debtor against the risk of being notified and being asked to pay by a potentially unknown person is a distinct matter, which is addressed by allowing the debtor in the case of notification by the assignee to request adequate proof (see article 19, paragraph 7).

Notification as a right, not an obligation

123. With a view to accommodating non-notification practices, notification is formulated in paragraph 1 as a right and not as an obligation. In such practices, in order to avoid any inconvenience to the debtor that might result in an interruption to the normal flow of payments, no notification at all is given (e.g. undisclosed invoice discounting or securitization). If the debtor is notified, so as not to accumulate rights of set-off from unrelated contracts (see article 20, paragraph 2), the debtor is instructed to continue paying the assignor, unless a default-like situation arises in which different payment instructions are given normally.

Notification and payment instruction

124. In line with the approach followed in article 5 (d) (which defines notification without any reference to a payment instruction), paragraph 1 draws a clear distinction between a notification and a payment instruction. This approach is intended to recognize the difference, both in purpose and in time, between a notification and a payment instruction. It is also intended to validate practices in which notification is given without any payment instructions (e.g. to cut off the debtor's rights of set-off arising from contracts unrelated to the original contract). Under paragraph 1, before notification, a payment instruction may be sent either by the assignor or by the assignee and, after notification, only by the assignee. Unlike article 19, paragraph 1, refers to the time notification is "sent" (not "received") because neither the assignor nor the assignee has a way to assess the time of receipt. In any case, that time is not important for the determination of who has the right to give a payment instruction as between the assignor and the assignee.

Agreements as to notification

125. While paragraph 1 grants the assignee an autonomous right to notify the debtor and to request payment, it also recognizes the right of the assignor and the assignee to negotiate and agree on the matter of notification of the debtor so as to meet their particular needs. For example, the assignor and the assignee may agree that no notification would be given to the debtor as long as the flow of payments is not interrupted. In order to ensure that there is no need for a specific agreement, the opening words of paragraph 1 are formulated in a negative way ("unless otherwise agreed").

126. The purpose of the rule introduced in paragraph 2 is that, if notification or a payment instruction is given in violation of such an agreement and the debtor pays, the debtor is discharged. The underlying rationale is that the debtor should be able to discharge its obligation as directed and should not concern itself with the private arrangements between the assignor and the assignee. Whether the person violating such an agreement is liable for breach of contract under law applicable outside the draft Convention is a separate matter and should not affect the discharge of the debtor, who is not a party to that agreement. A notification given in violation of an agreement between the assignor and the assignee, however, does not cut off any rights of set-off of the debtor from contracts unrelated to the original contract (see article 20). Such a notification does not trigger a change in the way the assignor and the debtor may amend the original contract (see article 22) or create a basis for the determination of priority under the law applicable to priority issues either (see articles 24-26). The reason for this approach is that the assignee who wrongfully notified the debtor should not be given an undue advantage. The double negative formulation in paragraph 2 ("is not ineffective") is intended to ensure that the mere violation of an agreement neither invalidates the notification for the purpose of debtor discharge, nor interferes with contract law as to the conditions required for such an agreement to be effective.

Article 16
Right to payment

1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.

2. The assignee may not retain more than the value of its right in the receivable.

References

A/CN.9/447, paras. 48-68; A/CN.9/456, paras. 145-159; A/CN.9/466, paras. 118-123; and A/55/17, paras. 166-167.

Commentary

Objective and scope

127. Article 16 is intended to state explicitly what is already implicit in articles 2 and 9, namely, that, as between the assignor and the assignee, the assignee has a proprietary right in the assigned receivable and in any proceeds arising from the receivables. As the scope of article 16 is limited to the relationship between the assignor and the assignee, it is subject to the general principle of party autonomy embodied in article 6 and is intended to operate as a default rule. It is not intended to affect the debtor's legal position or issues of priority.

Rights in proceeds and returned goods

128. As between the assignor and the assignee, the assignee's right extends to proceeds (which, under article 5 (j), includes whatever is received in respect of a receivable and its proceeds). It also extends to goods returned as defective or after the expiry of a trial period. Unlike in a priority contest under article 24, where the assignee's right in proceeds does not extend to returned goods, in this context, there is no reason to limit the ability of the assignor and the assignee to agree that the assignee could claim any returned goods. This result is also justified by the fact that, even in the absence of an agreement, a default rule allowing the assignee to claim any returned goods could reduce the risks of non-collection from the debtor and thus have a positive impact on the cost of credit. Paragraph 1 covers situations in which payment has been made to the assignee, the assignor or another person. In the last case, the assignee's right is, under paragraph 1 (c), subject to priority.

129. Paragraph 2 reflects normal practice in assignments by way of security. In such assignments, the assignee may have the right to collect the full amount of the receivable owed, plus interest owed on the ground of contract or law, but has to account for and return to the assignor any balance remaining after payment of the assignee's claim. Paragraph 2 does not repeat the reference to a contrary agreement of the parties, since it is included in the chapeau of paragraph 1 and the assignee's right in the assigned receivable flows from the assignment contract and is, under article 13, subject to party autonomy anyway.

Notification of the debtor

130. The assignee's right in proceeds is independent of any notification of the assignment (the nature of such a right is left to the law of the assignor's location; see article 24, paragraph 1 (a) (ii), (b) and (c)). The reason for this approach is the need to ensure that, if payment is made to the assignee even before notification, the assignee may retain the proceeds of payment. This approach is also justified by the need to ensure that, if payment is made to the assignor after notification, the assignee would have a choice between claiming payment from the assignor, under article 16, paragraph 1 (b), or from the debtor, under article 19, paragraph 2. This result is appropriate. The debtor, who pays the assignor after notification, takes the risk of having to pay twice and of not being able to recover from the assignor if the assignor becomes insolvent (in practice, the assignee would not claim a second payment from the debtor, unless the assignor had become insolvent).

2. Section II
Debtor

Article 17
Principle of debtor protection

1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

(a) Change the currency of payment specified in the original contract; or

(b) Change the State specified in the original contract in which payment is to be made to a State other than that in which the debtor is located.

References

A/CN.9/420, para. 101; A/CN.9/432, paras. 33-38, 89, 90, 206 and 244; A/CN.9/434, paras. 86-95; A/CN.9/445, paras. 195-198; A/CN.9/456, paras. 21, 81 and 168-176; and A/55/17, paras. 168-173.

Commentary

Principle of debtor protection

131. The principle of debtor protection is one of the main general principles of the draft Convention. It is referred to in a general manner in the preamble and in article 17. Furthermore, it is reflected in a number of provisions of the draft Convention (e.g. articles 1, paragraph 3, 6, 19-23, 29 and 40). The thrust of the rule set forth in paragraph 1 is that there are no implied effects of the draft Convention on the legal position of the debtor (any doubt as to whether an assignment changes the debtor's legal position should be resolved in favour of the debtor). The draft Convention is, in particular, not designed to change the payment terms stipulated in the original contract (e.g. the amount owed, whether for principal or interest; the date payment is due; and any conditions precedent to the debtor's obligation to pay). The draft Convention is not intended to change the defences or rights of set-off that the debtor may raise under the original contract or to increase expenses in connection with payment either. Such changes may, however, be effected with the consent of the debtor (see, however, para. 132).

Consumer protection

132. A particular principle flowing from article 17 is that the draft Convention is not intended to have an adverse effect on the rights of consumer debtors and, in particular, to override consumer-protection legislation, which normally reflects public policy or mandatory law considerations. This principle is also reflected in a number of provisions of the draft Convention, as, for example, in articles 21, paragraph 1 and 23 (see also paras. 36 and 103).

Country and currency risk

133. Whatever change is effected in the debtor's legal position as a result of an assignment under the draft Convention, under paragraph 2, a payment instruction, whether given with the notification or subsequently, may not change the currency of payment. It may not change the country of payment either, unless the change is beneficial to the debtor and results in payment being allowed in the country in which the debtor is located. Such a change of the country of payment is often allowed in factoring transactions so as to facilitate payment by debtors. Paragraph 2 refers to the currency or the country of payment "specified" in the original contract. Such specification may be explicit or implicit.

United Nations A/CN.9/489/Add.1

General Assembly

Distr.: General
22 May 2001

Original: English

United Nations Commission
on International Trade Law
Thirty-fourth session
Vienna, 25 June-13 July 2001

Receivables Financing

Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade

Addendum

Note by the Secretariat

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I. Introduction

1. The commentary on articles 1 to 17 of the draft Convention is contained in document A/CN.9/489. The present note contains the commentary on the remaining provisions of the draft Convention and the annex to the draft Convention, as they appear in document A/CN.9/486, Annex I.[1]

II. Analytical commentary

A. Chapter IV
Rights, obligations and defences

1. Section II
Debtor

Article 18
Notification of the debtor

1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.

2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

3. Notification of a subsequent assignment constitutes notification of all prior assignments.

References

A/CN.9/420, paras. 124 and125; A/CN.9/432, paras. 176,177 and 187; A/CN.9/434, paras. 172-175; A/CN.9/447, paras. 45-47, 158 and 159; A/CN.9/455, paras. 59-66; A/CN.9/456, paras. 177-180; and A/CN.9/486, paras. 12-20.

Commentary

Time of effectiveness of notification: the receipt rule

2. The primary purpose of article 18 is to state the "receipt rule" with regard to the time of effectiveness of a notification, that is, that both a notification and a payment instruction become effective when received by the debtor. When exactly a debtor is deemed to receive a notification is a matter left to law applicable outside the draft Convention. Article 18, paragraph 1, also adds a requirement to those provided in article 5 (d) for a notification to be effective under the draft Convention, namely that a notification has to be in a language "that is reasonably expected to inform the debtor". In referring to expectations, paragraph 1 introduces a subjective criterion which is, however, limited by the reference to the reasonableness of such expectations. To

[1] The previous version of the commentary on the entire draft Convention is contained in document A/CN.9/470.

provide guidance to parties, paragraph 1 introduces a "safe harbour" rule, according to which the language of the original contract meets the required standard of a language reasonably expected to inform the debtor (for the relationship between a notification and a payment instruction, see A/CN.9/489, para. 124).

Notification with respect to receivables not existing at the time of notification

3. Unlike article 8, paragraph 1 (c), of the UNIDROIT Convention on International Factoring (Ottawa, 1988; "the Ottawa Convention") and in line with normal practice in receivables financing, paragraph 2 allows a notification to be given with respect to receivables not existing at the time of notification. Such a notification simplifies and reduces the cost of notification in that it ensures that notification does not have to be given each time a receivable arises. It also ensures that, once a receivable arises, the debtor cannot accumulate rights of set-off from unrelated contracts with the assignor or modify the original contract without the consent of the assignee. More importantly, paragraph 2 sets aside any limitations existing under law applicable outside the draft Convention with respect to notification relating to receivables not existing at the time of notification. As this matter is governed in article 18, it is not referred to the law of the assignor's location (see opening words of article 24 and para. 35).

Notification in subsequent assignments

4. Paragraph 3, which is inspired by article 11, paragraph 2, of the Ottawa Convention, validates normal practice in particular in international factoring transactions. In view of the fact that the debtor is normally notified only of the second assignment from the export factor to the import factor, it is essential to ensure that notification of the second assignment covers the first assignment from the assignor to the import factor as well. In the absence of notification with respect to the first assignment, that assignment might be rendered ineffective as against the debtor, a situation that might affect the effectiveness of the second assignment as well. In order to address subsequent assignments in general, paragraph 3 provides that a notification covers any prior, and not only the immediately preceding, assignment (with regard to the issue of the discharge of the debtor in the case of several notifications relating to subsequent assignments, see para. 12). Paragraph 3 does not require the notifying party to identify prior assignments. However, in the case of doubt, the debtor may request that information (see article 19, paragraph 7, and para. 13). In addition, nothing in paragraph 3 (or in articles 5 (d) or 15) precludes the assignor in a prior assignment from notifying the debtor about a subsequent assignment to which that assignor is not a party.

Article 19
Debtor's discharge by payment

1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.

2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.

3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.

7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

8. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.

References

A/CN.9/420, paras. 98-117, 127-131, 169-173 and 179; A/CN.9/432, paras. 165-174 and 178-204; A/CN.9/434, paras. 176-191; A/CN.9/447, paras. 69-93 and 153-157; A/CN.9/455, paras. 52-58; A/CN.9/456, paras. 181-193; A/CN.9/466, paras. 124-132; and A/CN.9/486, paras. 21-29.

Commentary

5. The main goal of article 19 is to provide certainty as to the debtor's discharge and to thus facilitate payment of the debt. It is not intended to deal with the discharge of the debtor in general or with the payment obligation as such, since that obligation is subject to the original contract and to the law governing that contract. It is not intended to address issues of priority either. The debtor may be discharged in accordance with article 19 even if the payee does not have priority (see para. 9 below). It is up to the person with priority to claim the proceeds of payment by the debtor.

Debtor's discharge by payment before and after notification

6. Under paragraph 1, until the time of receipt of a notification, the debtor is entitled to discharge by paying in accordance with the original contract. In view of the fact that the assignment is effective as of the time of the conclusion of the contract of assignment, the debtor, having knowledge of the assignment, may choose to discharge its debt by paying the assignee even before notification. However, in such a case the debtor takes the risk of having to pay twice, if it is later proved that there was no assignment at all or, at least, no effective assignment. In order to avoid undermining practices in which the debtor is normally expected to continue paying the assignor even after notification there is no explicit reference to the possibility of the debtor being able to pay before notification either the assignor or the assignee. The reference to payment "in accordance with the original contract", rather than to payment to the assignor, is intended to preserve any payment agreement between the assignor and the debtor (e.g. payment to a bank account or address, or payment to a third person).

7. After notification, the debtor may discharge its obligation only by paying the assignee or as instructed by the assignee. Reflecting normal practice, paragraph 1 recognizes payment

instruction as a notion distinct from notification. While in some practices (e.g. factoring) payment instructions are given together with notification, in other practices (e.g. undisclosed invoice discounting or securitization), notification may be given without any payment instructions. The purpose of such a notification is normally to freeze the debtor's rights of set-off. To avoid leaving any uncertainty, paragraph 2 repeats what is already stated in article 15, paragraph 1, namely, that such instructions may be given, up to notification, by the assignor and, subsequently, only by the assignee. Paragraph 2 is also intended to clarify that a payment instruction should be in writing.

Knowledge of an assignment

8. Knowledge of an assignment is not to be treated as having the effect of a notification and does not trigger a change in the way in which the debtor has to discharge its obligation. While making business practice conform to good faith standards is an important goal, this should not be at the expense of certainty. Certainty as to the discharge of the debtor would be reduced if it were to be subject to subjective and unclear circumstances, such as knowledge on the part of the debtor (issues such as what constitutes knowledge and who has to establish it would need to be addressed). In addition, knowledge should not trigger a change in the way the debtor is to discharge its obligation, since, in certain cases, it is normal business practice for the debtor to continue paying the assignor even though the debtor knows (or is even notified) of the assignment (see para. 6). Article 19 does not deal with the issue of payment to a person, the assignment to whom was null and void (e.g. for fraud or duress or lack of capacity to act) or whether knowledge of such nullity should be taken into account in the debtor's discharge. As this problem arises only in exceptional situations, it is left to law applicable outside the draft Convention.

Debtor's discharge and priority

9. Unlike article 8, paragraph 1, of the Ottawa Convention, article 19 does not require the debtor to pay the person with a superior right (priority) so as to obtain a valid discharge. In line with the principle of debtor protection, article 19 draws a clear distinction between the debtor's discharge and priority among competing claimants. Thus, payment under article 19 discharges the debtor, even if the person receiving payment does not have priority. It would be unfair and inconsistent with the policy of debtor protection to require the debtor to determine who among several claimants has priority and to have the debtor pay a second time if, in the first instance, it has paid the wrong person. The debtor would most likely have a cause of action against that person, but the debtor's rights may be frustrated if that person becomes insolvent. The risk of insolvency of the person who received payment should be on the various claimants of the receivables and not on the debtor. Such claimants have normally ways to ensure that they have priority and that the debtor is notified accordingly.

Change or correction of payment instructions

10. Paragraph 3 is intended to ensure that the assignee may change or correct its payment instructions. A new instruction is effective if given by the assignee, since the first instruction constitutes notification and after notification only the assignee may give a payment instruction (see articles 15, paragraph 1 and 19, paragraph 2). In order to protect the debtor against the risk of having to pay twice, paragraph 3 allows the debtor to disregard a payment instruction received by the debtor after payment.

Multiple notifications

11. Paragraphs 4 and 5 are intended to provide simple and clear discharge rules in the case of several notifications. Paragraph 4 deals with situations in which the debtor receives several notifications relating to more than one assignment of the same receivables by the same assignor ("duplicate assignments"). Such situations do not necessarily involve fraud. They may, for

example, involve several assignments (including outright assignments) for security purposes of receivables for credit not exceeding the value of the receivables. In such assignments, the main issue is who will obtain payment first (i.e. who has priority), a matter dealt with in article 24.

12. Paragraph 5 deals with situations in which several notifications are given with respect to one or more subsequent assignments. Such situations are rare in practice, since normally only the last in a chain of assignees notifies the debtor and requests payment. In any case, in order to avoid any uncertainty as to how the debtor may discharge its debt, paragraph 5 provides that the debtor has to follow the instructions contained in the notification of the last assignment in a chain of assignments. For that rule to apply, the notifications received by the debtor have to be readily identifiable as notifications relating to subsequent assignments. Otherwise, the rule contained in paragraph 4 would apply and the debtor would be discharged by payment in accordance with the first notification received. In any case, under paragraph 7, the debtor, if in doubt, can request adequate proof from the assignees notifying. In the case of several notifications relating to both duplicate and subsequent assignments, paragraph 4 and 5 will provide a solution. In line with the principle of debtor protection, in the case of several notifications relating to partial assignments, paragraph 6 allows the debtor to discharge by paying the several creditors or to treat the notification as ineffective and to discharge in accordance with article 19.

Right of the debtor to request additional information

13. Under article 15, notification may be given not only by the assignor but also by the assignee independently of the assignor. As a result, the debtor may receive notification of the assignment from a possibly unknown person and may be in doubt as to whether that person is a legitimate claimant, payment to whom would discharge the debtor. In addition, under article 18, paragraph 3, notification of a subsequent assignment constitutes notification of any prior assignment even if such assignment is not identified in the notification. In order to protect the debtor from uncertainty as to how to discharge its debt in such cases, paragraph 7 gives the debtor a right to request the assignee to provide within a reasonable period of time adequate proof of the initial assignment and, if it is not an initial but a subsequent assignment, of any preceding assignment. The debtor may, but does not have to, request adequate proof. If the debtor had to request adequate proof in all cases, payment would be delayed or assignees foreseeing that the debtor would request such proof would provide it in the notification, a result that could raise the cost of notification. The determination of what constitutes "adequate" proof and a "reasonable" period of time is a matter of interpretation for the courts or arbitral tribunals taking into account the particular circumstances. The flexibility introduced with these terms was thought to be necessary since no rule could suit all possible cases. However, in order to avoid any uncertainty that might ensue as a result, paragraph 7 includes a "safe harbour" rule. According to that rule, a written confirmation from the assignor constitutes adequate proof.

14. Notification does not trigger the obligation to pay, which remains payable at the time and according to the terms of the original contract and the law applicable thereto. This means that the debtor does not have to pay upon notification and does not owe interest for late payment while it awaits the adequate proof requested. If the receivable becomes payable in accordance with the original contract within that period, the debtor may still be able to discharge its obligation, for example, by paying to a public deposit fund (see article 19, paragraph 8). If such alternative method of payment is not available, the payment obligation should be suspended until the debtor receives adequate proof and has a reasonable time to assess and act on it. Otherwise, the protection afforded to the debtor by paragraph 7 would be meaningless.

Debtor's discharge under other law

15. Paragraph 8 is intended to ensure that article 19 does not exclude other ways of discharge of the debtor's obligation by payment to the right person that may exist under national law

applicable outside the draft Convention (e.g. payment in accordance with a notification not conforming with the requirements of article 6 (f), 15 or 18).

Article 20
Defences and rights of set-off of the debtor

1. In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself if such claim were made by the assignor.

2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received.

3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 11 against the assignor for breach of agreements limiting in any way the assignor's right to assign its receivables are not available to the debtor against the assignee.

References

A/CN.9/420, paras. 66-68 and 132-135; A/CN.9/432, paras. 205-209; A/CN.9/434, paras. 194-197; A/CN.9/447, paras. 94-102; A/CN.9/456, paras. 194-199; A/CN.9/466, paras. 133-136; and A/CN.9/486, paras. 30-32.

Commentary

16. With the exception of defences and rights of set-off referred to in paragraphs 2 and 3, the debtor has against the assignee all the defences and rights of set-off that the debtor could raise against the assignor. What those defences and rights of set-off are is a matter not addressed in the draft Convention but left to other law. However, as the assignee is not a party to the original contract, the assignee incurs no positive contractual liability for non-performance by the assignor. In such a case, the debtor can raise the non-performance to defeat the assignee's claim, but needs to make a separate claim against the assignor to obtain, for example, compensation for any loss suffered as a result of the assignor's non-performance (see para. 29).

17. Under paragraph 1, there is no limitation as to defences or rights of set-off that arise from the original contract or from a closely connected contract (e.g. a maintenance or other service agreement). Such defences and rights of set-off (transaction set-off) may be raised even if they become available to the debtor after notification is received. According to paragraph 2, any other rights of set-off (independent set-off) may be raised against the assignee only if they are available to the debtor at the time notification is received. Such rights include rights arising from a separate contract between the assignor and the debtor, a rule of law (e.g. a tort rule) or a judicial or other decision. The reason for this approach is that the rights of a diligent assignee should not be made subject to rights of set-off arising at any time from separate dealings between the assignor and the debtor or other events of which the assignee could not reasonably be expected to be aware. Uncertainty as to the debtor's defences and rights of set-off would also make it difficult for the assignee to price the credit offered to the assignor. Furthermore, a contrary approach could have the unintended effect of allowing the assignor and the debtor to manipulate the amount owed. If the fact that the debtor cannot accumulate rights of set-off constitutes an unacceptable hardship for the debtor, the debtor can avoid entering into new dealings with the assignor. Rights of set-off arising from a separate contractual or other relationship between the debtor and the assignee are not affected by this rule and may be raised at any time. The exact meaning of the term "available" (e.g. whether the right of set-off has to be actual and ascertained, mature or quantified at the time notification is received by the debtor) is also left to other law.

18. Paragraph 3 is intended to ensure that the debtor may not raise against the assignee by way of defence or set-off the breach of a contractual limitation on assignment by the assignor. The debtor may have a cause of action against the assignor, if, under law applicable outside the draft Convention, the assignment constitutes a breach of contract that results in a loss to the debtor. However, the mere existence of a contractual limitation is not a violation of the representation contained in article 14, paragraph 1 (a) (see A/CN.9/489, para. 117). Otherwise, the rule holding the assignee harmless for breach of contract by the assignor (see article 11, paragraph 2) could be deprived of any meaning.

Article 21
Agreement not to raise defences or rights of set-off

1. Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 20. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

2. The debtor may not exclude:

(a) Defences arising from fraudulent acts on the part of the assignee; or

(b) Defences based on the debtor's incapacity.

3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 22, paragraph 2.

References

A/CN.9/420, paras. 136-144; A/CN.9/432, paras. 218-238; A/CN.9/434, paras. 205-212; A/CN.9/447, paras. 103-121; A/CN.9/456, paras. 200-204; A/CN.9/466, paras. 137-140; and A/CN.9/486, paras. 33-34.

Commentary

19. In return for better credit terms, assignors normally guarantee as against assignees the absence of defences and rights of set-off by the debtor (see article 14, paragraph 1 (c)). For the same reason, debtors often waive their defences and rights of set-off. With a view to facilitating this practice, article 21 validates such waivers of defences and rights of set-off. In order to avoid uncertainty as to the legal consequences of a waiver, paragraph 1 states what may appear to be obvious in some legal systems, namely, that a waiver agreed upon between the assignor and the debtor may benefit the assignee. In recognition of the fact that in practice a waiver may be agreed upon at different points of time, paragraph 1 does not make specific reference to the point of time at which a waiver may be agreed upon. Paragraph 1 does not require either that the defences be known to the debtor or be explicitly stated in the agreement by which the defences are waived. Such a requirement could introduce an element of uncertainty, since the assignee would need to establish in each particular case what the debtor knew or ought to have known. Whether the acceptance of an assignment by the debtor should be construed as a waiver or as a confirmation of a waiver and whether a waiver of defences is to be construed as a consent or confirmation of the debtor's consent to the assignment are matters left to other law.

20. Paragraph 1 is limited to waivers agreed upon by the assignor and the debtor. As a result, the limitations contained in paragraph 2 do not apply to waivers agreed upon by the debtor and the assignee and the debtor's ability to negotiate with the assignee in order to obtain a benefit is

not limited. At the same time, article 19 does not empower the debtor to negotiate waivers with assignees, if, under other law applicable, the debtor does not have such a power. In order to protect debtors from undue pressure by creditors to waive their defences, paragraphs 1 and 2 introduce reasonable limitations. Such limitations refer to the form in which such waivers can be made, to certain types of debtors and to certain types of defences.

21. Under paragraph 1, a waiver cannot be a unilateral act or an oral agreement. It has to take the form of a written agreement and one that is signed by the debtor (for the distinct notions of "writing" and "signature", see A/CN.9/489, paras. 60-61). This requirement is intended to ensure that both parties, and in particular the debtor, are well informed about the fact of the waiver and its consequences. It is also intended to facilitate evidence. In addition, a waiver cannot override the consumer-protection law prevailing in the country in which the debtor is located (for consumer receivables and consumer protection, see A/CN.9/489, paras. 36, 103 and 132). In cases where both articles 21 and 30 apply (i.e. the assignor is located in a Contracting State and that State has not opted out of chapter V), article 21 substitutes a specific applicable law reference to the debtor's location for the general rule set forth in article 30. In order to avoid terminological and other differences existing among the various legal systems with respect to the meaning of the notion "consumer", paragraph 1 uses generally accepted terminology from article 2 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; "the Sales Convention").

22. Under paragraph 2, a waiver cannot relate to defences arising from fraudulent acts committed by the assignee alone or by the assignee in collusion with the assignor. Such a result would run counter to basic good faith standards. Paragraph 2 does not refer to defences relating to fraud committed only by the assignor. If the debtor could not waive such defences, the assignee would have to conduct an investigation in this regard. Such a result could create uncertainty and have a negative impact on the cost of credit.

23. In line with paragraph 1, paragraph 3 requires a written agreement signed by the debtor for the modification of a waiver. Parties need to be warned of the legal consequences of such a modification. Furthermore, those circumstances should be easily proved, if necessary. With a view to ensuring that a modification does not affect the rights of the assignee, paragraph 3 subjects it to the actual or constructive consent of the assignee (see article 22, paragraph 2, and para. 27 below).

Article 22
Modification of the original contract

1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee and the assignee acquires corresponding rights.

2. After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:

(a) The assignee consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.

References

A/CN.9/420, para. 109; A/CN.9/432, paras. 210-217; A/CN.9/434, paras. 198-204; A/CN.9/447, paras. 122-135; A/CN.9/456, paras. 205 and 206; A/CN.9/466, paras. 141 and 142; and A/CN.9/486, paras. 35-36.

Commentary

24. Contracts normally deal with their modification. Article 22 does not interfere with such contractual clauses. It does, however, deal with the third-party effects of such contract modifications, namely with the question whether the debtor has as against the assignee the right to modify the original contract and whether the assignee acquires rights as against the debtor under the modified original contract.

25. Before notification, the assignor and the debtor may freely modify their contract. They do not need to obtain the consent of the assignee, even though the assignor may have undertaken in the assignment contract to abstain from any contract modifications without the consent of the assignee or, under law applicable outside the draft Convention, the assignor may be under the good faith obligation to inform the assignee about a contract modification. The breach of such an undertaking may give rise to liability of the assignor as against the assignee (see para. 28). It does not, however, invalidate an agreement modifying the original contract, since such an approach would inappropriately affect the rights of the debtor. After notification, a modification of the original contract becomes effective as against the assignee subject only to the actual or constructive consent of the assignee. The underlying rationale is that, after notification, the assignee becomes a party to a triangular relationship and any change in that relationship that affects the assignee's rights should not bind the assignee against its will.

26. Paragraph 1 requires an agreement between the assignor and the debtor, which is concluded before notification of the assignment and affects the assignee's rights. If the agreement does not affect the rights of the assignee, paragraph 1 does not apply. If the agreement is concluded after notification, paragraph 2 applies. Notification takes effect when received by the debtor. After that time, the debtor may discharge its obligation only in accordance with the assignee's payment instructions (see article 19, paragraph 2).

27. Paragraph 2 is formulated in a negative way, since the rule is that, after notification, a modification is ineffective as against the assignee, unless an additional requirement is met. "Ineffective" means that the assignee may claim the original receivable and the debtor is not fully discharged by paying less than the value of the original receivable. Paragraph 2 requires actual or constructive consent of the assignee. Actual consent is required if the receivable has been fully earned by performance and the assignee has thus the reasonable expectation that it will receive payment of the original receivable. When an invoice is issued, a receivable should be considered as having been fully earned, even if the relevant contract has been performed partially. As a result, a partially performed contract may be modified only with the actual consent of the assignee. Constructive consent exists if the original contract allows modifications or a reasonable assignee would have given its consent. Such consent is sufficient if the receivable is not fully earned and the modification is foreseen in the original contract or a reasonable assignee would have consented to such a modification. In requiring actual or constructive consent, article 22 is intended to establish an appropriate balance between certainty and flexibility. If a receivable is fully earned, its modification affects the reasonable expectations of the assignee and has thus to be subject to the actual consent of the assignee. If, on the other hand, a receivable is not fully earned, there is no need to overburden the parties with requirements that may affect the efficient operation of a contract. In particular, in long-term contracts, such as project financing or debt-restructuring arrangements, a requirement that the assignor would have to obtain the assignee's consent to every little contract modification could slow down the operations while creating an unwelcome burden for the assignee. This problem would normally not arise, since in practice parties tend to resolve such issues through an

agreement as to which types of modifications require the assignee's consent. In the absence of such an agreement or in the case of breach of such an agreement by the assignor, paragraph 2 would provide an adequate degree of protection to the debtor.

28. Paragraph 3 is intended to preserve any right the assignee may have under other law as against the assignor if a modification of the original contract violates an agreement between the assignor and the assignee. This means that, if, under article 22, a modification is effective as against the assignee without its consent, the debtor is discharged by paying in accordance with the contract as modified. The assignee, however, retains any remedies it might have against the assignor under the applicable law, if the modification is in breach of an agreement between the assignor and the assignee (e.g. the assignee may claim the balance of the original receivable and compensation for any additional damage suffered).

Article 23
Recovery of payments

Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

References

A/CN.9/420, paras. 145-148; A/CN.9/432, paras. 239-244; A/CN.9/434, paras. 94 and 213-215; A/CN.9/447, paras. 136-139; A/CN.9/456, paras. 207 and 208; A/CN.9/466, paras. 143 and 144; and A/CN.9/486, paras. 37-38.

Commentary

29. The main purpose of article 23 is to protect the assignee from a claim by the debtor for the recovery of payments made before performance of the original contract by the assignor. If the assignor does not perform, the debtor may refuse to pay the assignee (see article 20). If, however, the debtor pays the assignee before obtaining performance by the assignor, the debtor may not recover from the assignee the sums paid but is left with any remedies available under the applicable law against the assignor. There is one exception to this rule. If the debtor is a consumer, any right of the debtor to declare the original contract avoided or to recover from the assignee any payments made is not affected (for consumer receivables and consumer protection, see A/CN.9/489, paras. 36, 103, 132; see also para. 21 above). In particular, article 23 does not introduce the exceptions provided in article 10 of the Ottawa Convention in the case of unjust enrichment or bad faith on the part of the assignee. Such exceptions that operate as a guarantee by the assignee that the assignor will perform the original contract may be appropriate in the specific factoring situations addressed in the Ottawa Convention. However, they were considered to be inappropriate in the context of the wide range of financing or service transactions covered by the draft Convention.

Section III
Other parties

Article 24 Law applicable to competing rights

1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

(i) The characteristics and priority of the right of an assignee in the assigned receivable; and

(ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;][2]

(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

(i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;

(ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;

(iii) In the case of bank deposits, the law of the State in which the bank is located[; and

(iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located].

[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph]].

2. For the purposes of this article and article 31, the characteristics of a right are:

(a) Whether it is a personal or property right; and

(b) Whether or not it is security for indebtedness or other obligation.

References

A/CN.9/420, paras. 149-164; A/CN.9/432, paras. 245-260; A/CN.9/434, paras.238-258; A/CN.9/445, paras. 18-29 and 30-40; A/CN.9/455, paras. 18-34; A/CN.9/456, paras. 209-213; A/CN.9/466, paras. 20-24 and 32-35; and A/CN.9/486, paras. 39-63.

Commentary

Law applicable

30. Traditionally, priority issues have been submitted to the law of the location (*lex situs*) of the receivable. Departing from that approach, article 24 subjects priority issues to the law of the assignor's location. The traditional rule is no longer regarded as a workable or efficient rule and, in any case, there is no universal agreement on where a receivable is located. In the increasingly common case of a global assignment of present and future receivables, application of the law of the *situs* of the receivable fails to yield a single governing law. It also exposes prospective assignees to the burden of having to determine the notional *situs* of each receivable separately. Application of the law governing the receivable or of the law chosen by the parties produces similar results. Different priority rules would govern priority with regard to the various receivables in a pool of receivables. In the case of future receivables, the parties would not be able to determine with any certainty the law applicable to priority, a factor that might defeat a transaction or, at least, raise the cost of credit. Application of the law chosen by the assignor and the assignee in particular could allow the assignor, acting in collusion with a claimant in order to

[2] Pending final determination by the Commission of whether the bracketed language (i.e. paragraph 1 (b) and (c)) will be retained, the commentary does not cover that language.

obtain a special benefit, to determine the priority among several claimants. Such a result would run counter to the principle of party autonomy as limited in article 6. In addition, the law chosen by the parties would be completely unworkable in the case of several assignments of the same receivables either by the same or by different assignors, since different laws could apply to the same priority conflicts.

31. While article 24 departs from the traditional approach in order to accommodate the most common practices that involve bulk assignments of all present and future receivables, it makes no exception for assignments of single, existing receivables. Introducing a different priority rule with regard to the assignment of such receivables would detract from the certainty achieved in article 24. If the rule were to focus on the value of the assigned receivable, it would create other problems. First, it would be difficult to clearly define "high-value" receivables. Moreover, in a bulk assignment containing both "high-value" and "low-value" receivables, priority would be subject to different laws. Such a situation could inadvertently result in facilitating the manipulation of the applicable priority rule by the parties.

32. In the case of more than one place of business, location is defined by reference to the place of central administration of the assignor (see article 5 (h)). Accordingly, application of the law of the assignor's location will result in the application of the law of a single jurisdiction and one that can be easily determined at the time of the assignment. It will thus eliminate the difficulties mentioned above. In particular, the location of the assignor as a connecting factor presents the advantage that it provides a single point of reference; it can be ascertained at the time of even a bulk assignment of future receivables; it would be suitable even for legal systems in which registration is practised; and it would result in the application of the law of the jurisdiction in which any main insolvency proceeding with regard to the assignor would be most likely to commence. This last aspect of the application of the law of the assignor's location is essential, since it appropriately addresses the issue of the relationship between the draft Convention and the applicable insolvency law.

33. With respect to insolvency, the thrust of article 24 is to ensure that, in most cases, the law governing priority under article 24 and the law governing the insolvency of the assignor are the laws of one and the same jurisdiction (the assignor's main jurisdiction; see, for example, articles 2 (b) and 16, paragraph 3, of the UNCITRAL Model Law on Cross-Border Insolvency). In such a situation, any conflict between the draft Convention and the applicable insolvency law would be resolved by the rules of law of that jurisdiction. If an insolvency proceeding is commenced in a State other than the State of the assignor's main jurisdiction, article 25 applies. In such a case, a priority rule could be set aside if is manifestly contrary to the public policy of the forum; and the priority of special preferential rights would not be affected.

Limitations

34. Article 25 introduces two limitations to the law applicable under article 24 (see paras. 38-40). Beyond those limitations, there are other limitations. As a private international law provision, article 24 does not settle priority conflicts. It merely refers them to the law of the assignor's location. If that law has adequate rules, certainty would be enhanced. If that law does not have adequate rules, certainty would not be obtained. For that reason, different substantive law priority rules are offered in the annex for States to choose from (as to the options available to States and their effects, see article 42). Another limitation to article 24 is that, for it to apply, the assignor has to be located in a Contracting State at the time of the conclusion of the contract of assignment. In most cases, this limitation would cause no problems. However, if the assignor, after making an assignment, relocates and makes another assignment in another country, under article 24, there would be two laws of the assignor's location. This matter was deliberately not addressed, since it was thought that it would arise only in very exceptional situations. Yet another limitation is that, for article 24 to apply, the forum has to be in a Contracting State. To the extent that the forum cannot be predicted at the time of an assignment (see para. 39), certainty may not be obtainable.

Scope

35. The opening words of article 24 are intended to ensure that article 24 would apply only to matters that are not settled by way of a substantive law rule of the draft Convention. For example, the general effectiveness of an assignment of future receivables is addressed in article 9. Accordingly, an assignment is effective as between the assignor and the assignee, and as against the debtor, even in the absence of a notification or registration (if, under national law, notification or registration is a condition of material validity). Issues of formal validity are addressed in article 8 and issues of material validity other than those addressed in articles 9 to 12 are left to law applicable outside the draft Convention. The words "subject to articles 25 and 26" are intended to ensure that, in the case of conflict, articles 25 and 26 would prevail. For example, matters in article 24 are referred to the law of the assignor's location unless a rule of that law is manifestly contrary to the public policy of the forum and subject to certain super-priority rights to which priority is given under the law of the forum.

36. The chapeau of subparagraph (a) is aimed at ensuring that the characteristics of a right are referred to the law of the assignor's location only in the case of a priority conflict. The term "characteristics" is defined in paragraph 2, while the term "priority" is defined in article 5 (g). The term "competing claimant" is defined in article 5 (m) so as to ensure that all possible priority conflicts are referred to the law of the assignor's location. Conflicts between assignees of the same receivables from the same assignor are covered. Also covered are conflicts between a Convention and a non-Convention assignee (e.g. between a foreign and a domestic assignee of domestic receivables). Equally covered are conflicts between an assignee and a creditor of the assignor or the administrator in the insolvency of the assignor. Also covered are conflicts, in the case of subsequent assignments, between any assignee and the assignor's creditors or the administrator in the insolvency of the assignor (no conflict of priority can arise as between assignees in a chain of assignments). However, a conflict between an assignee in a Contracting State and an assignee in a non-Contracting State is not covered (as to conflicts arising between parties to assignments made before and after a declaration takes effect, or the draft Convention enters into force or is denounced, see articles 43, paragraph 7, 45, paragraph 4, and 46, paragraph 4 respectively).

37. Issues arising in the case of insolvency of the assignee are beyond the scope of the draft Convention and are not addressed, unless the assignee makes a subsequent assignment and becomes an assignor. The draft Convention is not intended to address issues arising in the context of the debtor's insolvency either. It is assumed that normally the assignee would have in the receivables the same rights that the assignor would have in the case of insolvency of the debtor.

Article 25
Public policy and preferential rights

1. The application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 24. A State may deposit at any time a declaration identifying any such preferential right.

References

A/CN.9/434, paras. 216-237; A/CN.9/445, paras. 41-44; A/CN.9/455, paras. 35-40; A/CN.9/456, paras. 214-222; A/CN.9/466, paras. 36-41 and A/CN.9/486, paras. 64-65.

Commentary

Public policy

38. A priority dispute will typically arise in the State of the assignor's location. In such a case, if that State is a Contracting State, the substantive law priority rule of the forum will be the law applicable pursuant to article 24. However, a priority dispute may also arise in a State other than the State of the assignor's location (e.g. a State where the assignor has assets or the State of the debtor's location). In such a case, a conflict may arise between a priority rule of the law of the State of the assignor's location and a priority rule of the forum. In principle, this conflict should be resolved in favour of the priority rule of the law applicable. Otherwise, the certainty achieved by any applicable law rule would be severely undermined or even negated. In the case of article 24, such a result could have a negative impact on the availability and the cost of credit on the basis of receivables. However, in private international law texts exceptions are typically introduced to preserve the public policy and certain mandatory law rules of the forum. The main purpose of article 25 is to introduce and, at the same time, to limit such exceptions.

39. Under paragraph 1, a court or other competent authority in the forum may refuse to apply a provision of the law of the State in which the assignor is located if that provision is manifestly contrary to the public policy of the forum. The public policy exception is qualified by the notion "manifestly contrary" (used also in article 33; see para. 53). This notion is used in international texts (see, for example, article 6 of the UNCITRAL Model Law on Cross-Border Insolvency) as a qualification of public policy. The purpose of such a qualification is to emphasize that public policy exceptions should be interpreted restrictively and paragraph 1 should be invoked only in exceptional circumstances concerning matters of fundamental importance for the forum (see Guide to Enactment of the Model Law, para. 89). Public policy in this sense, as it is used in an international context, normally permits rejection of the offensive provision of the otherwise applicable foreign law (e.g. a provision of law of the relevant foreign State, which gives overriding priority to the tax claims of the government of that State). It is not intended to result in the application of a rule of the law of the forum. It should be noted that it is the application of a relevant provision of the applicable law to a particular case, and not the applicable law in general, that needs to be manifestly contrary to the public policy of the forum.

Mandatory law

40. Article 25 does not contain a general exception as to the mandatory rules of the forum, since it is not intended to permit the substitution of the priority rules of the forum or another State for the priority rules of the applicable law (this approach is explicit in article 32, see para 52). Such an approach could seriously undermine the certainty achieved by article 24, since most priority rules of the forum or an another State would normally be mandatory law rules. However, in order to make the draft Convention more acceptable to States, paragraph 2 introduces a limited exception. In an insolvency proceeding opened in a State other than the State of the assignor's location, the forum may apply its own priority rule and give priority to super-priority rights that arise by operation of law of the forum, provided that they would have priority over the rights of an assignee under the law of the forum. The exception is stated in permissive terms ("may") to signal that the forum court should take a restrained approach, preserving forum preferential rights only if the policy underlying the preference is clearly engaged on the particular facts. Moreover, the exception in paragraph (2) applies only in the context of insolvency proceedings under the law of the forum. Non-consensual preferential rights that operate under forum law outside of the formal insolvency context are not preserved. Furthermore, paragraph 2 permits (but does not oblige) a State to list in a declaration the categories of non-consensual super-priority rights that will prevail under the substantive law of that State over the rights of an assignee pursuant to paragraph 2. This possibility for declarations is intended to enhance certainty by providing a simple disclosure mechanism for assignees to know which super-priority rights would prevail over their rights without having to investigate the substantive law of the relevant Contracting State.

Special insolvency rights

41. Article 25 makes no reference to special rights of creditors of the assignor or of the insolvency administrator that may prevail over the rights of an assignee under law governing insolvency. The reason is that priority established under the draft Convention is not intended to interfere with such special rights. Such special rights include, but are not limited to, any right of creditors of the assignor or the insolvency administrator to initiate an action to avoid or otherwise render ineffective an assignment as a fraudulent or preferential transfer. They also include any right of the insolvency administrator to initiate an action to avoid or otherwise render ineffective, an assignment of receivables that have not arisen at the time of the commencement of the insolvency proceeding; to encumber the assigned receivables with the expenses of the insolvency administrator in performing the original contract; or to encumber the assigned receivables with the expenses of the insolvency administrator in maintaining, preserving or enforcing the receivables at the request and for the benefit of the assignee. If the assigned receivables constitute security for indebtedness or other obligations, the special rights protected include any rights existing under insolvency rules or procedures governing the insolvency of the assignor that permit the insolvency administrator to encumber the assigned receivables; provide for a stay of the right of individual assignees or creditors of the assignor to collect the receivables during the insolvency proceeding; permit the substitution of the assigned receivables for new receivables of at least equal value; or provide for the right of the insolvency administrator to borrow using the assigned receivables as security to the extent that their value exceeds the obligations secured.

Article 26
Special proceeds rules

1. If proceeds are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.

2. If proceeds are received by the assignor, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee's right had priority over the right in the assigned receivable of that claimant if:

(a) The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

(b) The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee.

References

A/CN.9/447, paras. 63-68; A/CN.9/456, paras. 160-167; A/CN.9/466, paras. 42-53; and A/CN.9/486, paras. 66-67.

Commentary

42. The purpose of article 26 is to facilitate practices in which payment of the receivable is made to the assignee or to the assignor as an agent of the assignee (e.g. undisclosed invoice discounting and securitization). At the same time, by indicating a way in which assignees may obtain priority with respect to proceeds, article 26 may well facilitate other practices to the extent that they may be structured to meet the criteria of article 26. Paragraph 1 gives priority to an assignee with respect to the proceeds, if the assignee has received payment of and has priority with respect to the assigned receivable. The implicit limitation is that the assignee may not retain more than the value of its receivable. Paragraph 2 gives priority to an assignee with

respect to proceeds, if the assignee has priority with respect to the assigned receivable and if the assignor receives payment on behalf of the assignee and those proceeds are reasonably identifiable from the assignor's assets.

Article 27
Subordination

An assignee entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future assignees.

References

A/CN.9/445, para. 29; A/CN.9/455, para. 31; A/CN.9/456, para. 210; and A/CN.9/486, paras. 68-69.

Commentary

43. Article 27 is intended to recognize the interest of the parties involved in a conflict in negotiating and relinquishing priority in favour of a subordinate claimant where commercial considerations so warrant. In order to afford maximum flexibility and to reflect prevailing business practices, article 27 makes it clear that a valid subordination need not take the form of a direct subordination agreement between the assignee with priority and the beneficiary of the subordination agreement. It can also be effected unilaterally, for instance, by means of an undertaking of the first ranking assignee to the assignor, empowering the assignor to make a second assignment ranking first in priority. The term "unilaterally" is further intended to clarify that the beneficiary of the subordination (the second assignee) need not offer anything in exchange for the priority granted by the unilateral subordination. In referring to "agreement" in general, article 27 is intended to validate a subordination clause in the contract of assignment or in a separate agreement. Furthermore, article 27 clarifies that an effective subordination need not specifically identify the intended beneficiary or beneficiaries ("any existing or future assignees") and can instead employ generic language. Such unilateral subordination may take place in an assignment between entities in the same corporate group or may be a service offered by a lender to a borrower for commercial considerations.

Chapter V
Autonomous conflict-of-laws rules

Article 28
Application of chapter V

The provisions of this chapter apply to matters that are:

(a) Within the scope of this Convention as provided in article 1, paragraph 4; and

(b) Otherwise within the scope of this Convention but not settled elsewhere in it.

References

A/CN.9/420, paras. 185-187; A/CN.9/445, paras. 52-55; A/CN.9/455, paras. 67-73; A/CN.9/466, paras. 145-149; and A/CN.9/486, paras. 70-75

Commentary

44. Article 28 deals with the scope and the purpose of chapter V. Under subparagraph (a), chapter V may apply even if the assignor (or, with respect to the application of article 30, the

debtor) is not located in a Contracting State. In such a case, chapter V would introduce a second layer of unification, since it would apply to transactions falling outside the scope of the provisions of the draft Convention other than those in chapter V. Under subparagraph (b), chapter V would apply in the same way as, and supplement, the provisions of the draft Convention other than those in chapter V.

Article 29
Law applicable to the mutual rights and obligations of the assignor and the assignee

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them.

2. In the absence of a choice of law by the assignor and the assignee, their mutual rights and obligations arising from their agreement are governed by the law of the State with which the contract of assignment is most closely connected.

References

A/CN.9/420, paras. 188-196; A/CN.9/445, paras. 52-74; A/CN.9/455, paras. 67-119; A/CN.9/466, paras. 150-153; and A/CN.9/486, paras. 77-79.

Commentary

45. Article 29 reflects the principle of party autonomy with respect to the law applicable to the contract of assignment, which is widely recognized but not universally accepted. In view of the fact that paragraph 1 does not require an explicit choice, even an implicit choice of law would be sufficient. Under paragraph 1, the law chosen by the parties governs the purely contractual aspects of the contract of assignment. Such contractual aspects include the conclusion and the substantive validity of the contract of assignment, the interpretation of its terms, the assignee's obligation to pay the price or to render the promised credit, the existence and effect of representations as to the validity and enforceability of the receivable. With respect to assignments falling within the ambit of the provisions of the draft Convention other than those in chapter V, paragraph 1 is not intended to cover the substantive validity aspects addressed in the draft Convention (or other such aspects, such as capacity or authority to act). In the case of such assignments, paragraph 1 does not cover either the proprietary aspects of assignment addressed in the draft Convention (for this reason, reference is made to "the agreement" to assign as opposed to "the assignment" itself; for this distinction, see A/CN.9/489, para. 25). If the contract of assignment is just a clause in the financing contract, paragraph 1 does not cover the financing contract either, unless the parties agree otherwise.

46. Paragraph 2 is intended to deal with the exceptional situations in which the parties have not agreed (explicitly or implicitly) on the law applicable to the contract of assignment or in which the parties have agreed but their agreement is later found to be invalid. It refers to the closest-connection test, which may typically result in the application of the law of the assignor's location or of the law of the assignee's location.

Article 30
Law applicable to the rights and obligations of the assignee and the debtor

The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

References

A/CN.9/420, paras. 197-200; A/CN.9/445, paras. 65-69; A/CN.9/455, paras. 92-104 and 117; A/CN.9/466, paras. 154-158; and A/CN.9/486, paras. 80-84.

Commentary

47. In line with the principle of debtor protection, article 30 refers issues arising in the context of the relationship between the assignee and the debtor to the law governing the receivable, which, in the case of contractual receivables, is the law governing the original contract from which they arise. Reference is made to the law of the original contract, since, unlike article 12, paragraph 2 of the Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention) on which article 30 was modelled and which may apply to non-contractual rights, article 30 covers only contractual receivables (see article 2). No reference is made to how the law applicable to the original contract should be determined. Such elaborate rules are not necessary in a chapter that is intended to establish certain general principles, without addressing all assignment-related private international law issues. In any case, it would be inappropriate to attempt to determine the law governing the wide variety of contracts that might be at the origin of a receivable (e.g. contracts of sale, insurance contracts or contracts relating to financial markets operations).

48. Article 30 also applies to transaction set-off (i.e. a cross-claim arising out of the original contract or a closely related contract), since a transaction set-off would fall under the "relationship between the assignee and the debtor". Independent set-off (i.e. claims arising from sources that are unrelated to the original contract), however, is not covered. Such claims may arise from a variety of sources (e.g. a separate contract between the assignor and the debtor, a rule of law or a judicial or arbitral decision). Their availability and the conditions governing availability (e.g. liquidity, same currency and maturity) are left to other law, which is not specified in the draft Convention.

49. Article 30 also covers contractual, but not statutory, assignability as an issue relating to payment by and discharge of the debtor. This means that, if the provisions of the draft Convention outside chapter V do not apply with regard to the debtor, the effects of a breach of a contractual limitation on the relationship between the assignee and the debtor are left to the law governing the original contract. If those provisions apply, the assignment made in breach of a contractual limitation is effective as against the debtor (see article 11, paragraph 1) and the debtor will not have a defence as against the assignee (see article 20, paragraph 3).

Article 31
Law applicable to competing rights

1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

(i) The characteristics and priority of the right of an assignee in the assigned receivable; and

(ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;

(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

(i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;

(ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;

(iii) In the case of bank deposits, the law of the State in which the bank is located[; and

(iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located].

[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph]].

2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this article.

References

A/CN.9/445, paras. 70-74; A/CN.9/455, paras. 105-110; A/CN.9/466, paras. 159 and 160; and A/CN.9/486, paras. 85-86.

Commentary

50. While article 31 reproduces the rules in articles 24 and 25, it has a different scope in that it may apply irrespective of whether the assignor is located in a Contracting State (see articles 1, paragraph 4, and 28 (a)).

Article 32
Mandatory rules

1. Nothing in articles 29 and 30 restricts the application of the rules of the law of the forum State in a situation where they are mandatory, irrespective of the law otherwise applicable.

2. Nothing in articles 29 and 30 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

References

A/CN.9/455, paras. 111-117; A/CN.9/466, paras. 161 and 162; and A/CN.9/486, paras. 87-88.

Commentary

51. Paragraph 1 is intended to reflect a generally accepted principle in private international law according to which mandatory law rules of the forum may be applied irrespective of the law otherwise applicable (see article 7, paragraph 2, of the Rome Convention and article 11 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994; "the Mexico City Convention")). Mandatory law in this context refers to law of fundamental importance, such as consumer protection law or criminal law (*loi de police*) and not merely to law that cannot be derogated from by agreement. Paragraph 2 introduces a different rule, namely, that a court in a Contracting State may apply not its own law or the law applicable

under articles 29 and 30 but the law of a third country to which the matters settled in those provisions have a close connection (see article 7, paragraph 1, of the Rome Convention).

52. The scope of article 32 is limited to cases involving the law applicable to the contract of assignment and to the relationship between the assignee and the debtor. This means that the law applicable to priority issues may not be set aside as contrary to mandatory law rules of the forum or another State. In this respect, article 31, paragraph 2, under which a priority rule of the law applicable may be set aside for the purpose of protecting, for example, a relative right of the forum State for taxes, was considered to be sufficient. Such a limitation of the mandatory-law exception was thought to be justified on the grounds that priority rules are of a mandatory nature and setting them aside in favour of the mandatory rules of the forum or another State would inadvertently result in creating uncertainty as to the law applicable to priority and thus have a negative impact on the availability and the cost of credit.

Article 33
Public policy

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

References

A/CN.9/455, paras. 118 and 119; A/CN.9/466, paras. 163 and 164; and A/CN.9/486, paras. 89-90.

Commentary

53. Article 33 reflects a standard provision in private international law texts (see, for example, article 16 of the Rome Convention and article 18 of the Mexico City Convention). The purpose of this provision is to make it possible for States to set aside a rule of the applicable law that, as applied in a specific case, is "manifestly contrary" to the international public policy of the forum State (on the meaning of the notion "manifestly contrary", see para. 40).

Chapter VI
Final provisions

Article 34
Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

References

A/CN.9/455, paras. 124 and 125; and A/CN.9/486, paras. 91-92.

Commentary

54. The Treaty Section of the Office of Legal Affairs of the United Nations, located at United Nations Headquarters in New York, performs the depositary functions of the Secretary-General. Treaties, related declarations deposited with the depositary, as well as lists of Contracting States, are accessible through the home page of the Treaty Section on the World Wide Web (http://www.un.org/depositary). Treaties based on texts developed by the Commission are accessible through the UNCITRAL website, along with a wide range of relevant information, including status of texts (http://www.uncitral.org). Printed texts may be obtained from the

Treaty Section and the International Trade Law Branch, as well as from a variety of other sources, including United Nations depositary libraries.

Article 35
Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York, until [...].

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open to accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

References

A/CN.9/455, paras. 141 and 142; and A/CN.9/486, paras. 93-94.

Commentary

55. Article 35 is standard treaty provision. The period during which the Convention would be opened for signature by States remains to be determined.

Article 36
Application to territorial units

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

2. Such declarations are to state expressly the territorial units to which this Convention extends.

3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.

4. If a State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

References

A/CN.9/455, paras. 143 and 144; A/CN.9/486, paras. 95-96.

Commentary

56. Article 36 is intended to ensure that a federal State may adopt the draft Convention, even if, for any reason, it does not wish to or cannot, under internal law, have it apply to all its territorial units. Such a right is particularly important for States with more than one legal system. The declaration may be made at any time, including before or after ratification, approval or accession (reference is made to a "State" and not to a "Contracting State", since a declaration may be made

by a signatory State). The effect of a declaration under article 36 is that a party located in a territorial unit, to which the draft Convention is not to be applied by virtue of the declaration, is not considered to be located in a Contracting State (paragraph 3). If that party is the assignor, the draft Convention would not apply at all (with the exception of chapter V where the forum is in a Contracting State that has not opted out of chapter V). If that party is the debtor, the provisions of the draft Convention dealing with the rights and obligations of the debtor would not apply (unless the law governing the original contract is the law of a Contracting State or a territorial unit to which the draft Convention is to apply). The rule in article 5 (h) as to multiple places of business applies if "the assignor or the assignee has places in more than one State". For the purpose of article 36, it should be applied by analogy to cases in which there are multiple places of business in different entities of a federal State.

[Article 37
Applicable law in territorial units

If a State has two or more territorial units whose law may govern a matter referred to in chapters IV and V of this Convention, a reference in those chapters to the law of a State in which a person or property is located means the law applicable in the territorial unit in which the person or property is located, including rules that render applicable the law of another territorial unit of that State. Such a State may specify by declaration at any time how it will implement this article.]

References

A/CN.9/486, paras. 96-97.

Commentary

57. Article 37, which appears in square brackets pending final determination by the Commission of whether it should be retained, is intended to deal with applicable law issues in the case of a federal State (the commentary will be written once the article is finalized).

Article 38
Conflicts with other international agreements

1. This Convention does not prevail over any international agreement that has already been or may be entered into and that contains provisions concerning the matters governed by this Convention, provided that the assignor is located at the time of the conclusion of the contract of assignment in a State party to such agreement or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in a State party to such agreement or the law governing the original contract is the law of a State party to such agreement.

2. Notwithstanding paragraph 1 of this article, this Convention prevails over the Unidroit Convention on International Factoring ("the Ottawa Convention"). If, at the time of the conclusion of the original contract, the debtor is located in a State party to the Ottawa Convention or the law governing the original contract is the law of a State party to the Ottawa Convention and that State is not a party to this Convention, nothing in this Convention precludes the application of the Ottawa Convention with respect to the rights and obligations of the debtor.

References

A/CN.9/445, paras. 52-55, 75, 76 and 201-203; A/CN.9/455, paras. 67-73 and 126-129; A/CN.9/456, paras. 232-239; A/CN.9/466, paras. 192-195; and A/CN.9/486, paras. 98-108.

Commentary

58. Reflecting generally acceptable principles as to conflicts among international legislative texts (see, e.g., article 30 of the Vienna Convention on the Law of Treaties, 1969 ("the Vienna Convention"); and article 90 of the United Nations Sales Convention), paragraph 1 gives precedence to other texts that contain provisions that deal with matters covered by the draft Convention. Paragraph 2 takes a different approach with regard to the Ottawa Convention. The main reason for this approach is that the draft Convention is more comprehensive both in the scope and in the issues covered. The second sentence of paragraph 2 is intended to ensure that the application of the Ottawa Convention is not affected if a factoring contract is within the territorial scope of application of the Ottawa Convention but not of the draft Convention.

59. In view of the fact that the draft Convention contains private international law provisions, conflicts may arise with private international law texts, such as the Rome Convention and the Mexico City Convention. However, there are no conflicts with the Mexico City Convention, which addresses the law applicable to contracts in general (not assignment in particular) in a way that is consistent with article 29 of the draft Convention. Any conflicts between article 12 of the Rome Convention and articles 29 and 30 of the draft Convention are minimal, since those articles are almost identical with article 12 of the Rome Convention. Furthermore, normally, no conflicts should arise between article 12 of the Rome Convention and article 31 of the draft Convention, since, according to the prevailing view, article 12 of the Rome Convention does not address this matter. However, in the literature and in case law, the view has been expressed that article 12 of the Rome Convention addresses issues of priority, either in paragraph 1 (the law chosen by the parties) or in paragraph 2 (the law governing the receivable). The Commission has taken a different approach (the law of the assignor's location). In order to avoid any conflict with the Rome Convention, article 39 provides that a State may opt out of chapter V. As a result, if all States parties to the Rome Convention opt out of chapter V, no conflict would arise. However, an opt-out of articles 24 to 26 is not allowed. Therefore, conflicts may arise between articles 24 to 26 of the draft Convention and article 12 of the Rome Convention. Article 21 of the Rome Convention would not provide an answer to the question of which text would prevail, since it provides that the Rome Convention "shall not prejudice the application of international conventions". The matter would, therefore, be left to general principles of treaty law, under which the latest or the more specific text would prevail.

60. The European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings would refer conflicts of priority between an assignee and an insolvency administrator to the place where the insolvency proceeding is opened (see article 4). In the case of a main insolvency proceeding, that place is the place where the insolvent debtor (i.e. the assignor in the terminology of the draft Convention) has the centre of its main interests (see article 3, paragraph 1). If the assignor has just one place of business, that place is going to be the centre of its main interests and, as a result, both the draft Convention and the Regulation would refer to the same law. If the assignor has more than one place of business, both the draft Convention and the Regulation would refer to the law of the assignor's centre of main interests (as to the notion of central administration, see A/CN.9/489, para. 68).

61. In the case of a secondary insolvency proceeding, the Regulation would refer priority issues to the place where the assignor has an establishment, i.e. non-transitory economic activities (see article 3, paragraph 2, and 2 (h)), while the draft Convention would refer to the law of the assignor's main interests. The draft Convention goes a long way in addressing that conflict (which concerns all States and not only member States of the European Union). A priority rule that is manifestly contrary to the law of the forum can be set aside and super-priority rights with priority under the law of the forum are not affected (see article 25). Equally unaffected remain any special insolvency rights, such as those described in article 4, paragraph 2, of the Regulation (see para. 41 above) . The Regulation also reduces the potential for any conflict in providing that the opening of an insolvency proceeding in one State member of the European Union does

not affect rights *in rem*, rights of set-off or rights arising from a retention of title clause with respect to assets located in another member State (see articles 5-7 and 2 (g)). In any case, if a conflict arises, it should be resolved in favour of the regulation by virtue of article 38, paragraph 1 (the scope of which may need to be expanded).

62. Conflicts may arise with the preliminary draft Convention on International Interests in Mobile Equipment, currently being prepared by a group of experts in the context of the International Civil Aviation Organization ("ICAO"), UNIDROIT and other organizations. This preliminary draft Convention is intended to apply to certain types of high-value mobile equipment. An assignment of the security interest in such equipment transfers also the principal, secured obligation. An assignee registering this assignment with the international equipment-specific register of the preliminary draft Convention would prevail over an assignee of the principal obligation. Such an assignee of the principal obligation (e.g. an assignee under the draft Convention) could not register or obtain priority. Under article 38, paragraph 1, any conflicts with the preliminary draft Convention would be resolved in favour of the application of the preliminary draft Convention. The same result would presumably be reached, even in the absence of article 38, since according to general principles of treaty law the later or more specific text would prevail.

Article 39
Declaration on application of chapter V

A State may declare at any time that it will not be bound by chapter V.

References

A/CN.9/455, paras. 72 and 148; A/CN.9/466, paras. 196 and 197; and A/CN.9/486, paras. 109-111.

Commentary

63. In order to make the draft Convention more acceptable to States that do not need chapter V (e.g. because they are parties to other private international law texts, such as the Rome Convention), article 39 allows States to opt out (see also article 1, paragraph 4). The possibility for an opt-out, rather than an opt-in, is intended to make clear that chapter V forms an integral part of the draft Convention.

Article 40
Limitations relating to Governments and other public entities

A State may declare at any time that it will not be bound or the extent to which it will not be bound by articles 11 and 12 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government, central or local, any subdivision thereof, or an entity constituted for a public purpose. If a State has made such a declaration, articles 11 and 12 do not affect the rights and obligations of that debtor or person. A State may list in a declaration the types of entity that are the subject of a declaration.

References

A/CN.9/432, para. 117; A/CN.9/455, para. 48; A/CN.9/456, paras. 115 and 116; A/CN.9/466, paras. 107-115; and A/CN.9/486, paras. 112-114.

Commentary

64. Receivables owed by a State or other public entity are often not assignable by law. The draft Convention does not affect such statutory limitations on assignment (see article 9, paragraph 3). However, in some States, such statutory limitations are not normal practice and therefore sovereign debtors often resort to contractual limitations on assignment. In order to make the draft Convention more acceptable to such States, article 40 allows them to ensure the effectiveness of such contractual limitations with respect to sovereign debtors by making a declaration. If a declaration is made by the State in which a sovereign debtor is located at the time of the conclusion of the original contract, articles 11 and 12 do not affect the rights of that sovereign debtor. This means that an assignment will be ineffective as against the sovereign debtor, while it remains effective as against the assignor and the assignor's creditors. This approach is based on the assumption that, once the sovereign debtor is protected, there is no reason to invalidate the assignment in general. Preserving the validity of the assignment as between the assignor and the assignee would allow the assignee to obtain priority by meeting the requirements of the law of the assignor's location. Unlike article 6 of the Ottawa Convention, which allows a reservation with regard to any debtor, article 40 allows a reservation only with respect to sovereign debtors. As to public entities, article 40 leaves a wide flexibility to States to determine the types of entities they wish to exclude from the application of articles 11 and 12.

[*Article 41*
Other exclusions

1. A State may declare at any time that it will not apply this Convention to types of assignment or to the assignment of categories of receivables listed in a declaration. In such a case, this Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the original contract is the law of such a State.

2. After a declaration under paragraph 1 of this article takes effect:

(a) This Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State; and

(b) The provisions of this Convention that affect the rights and obligations of the debtor do not apply if, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the receivable is the law of such a State.]

References

A/CN.9/466, paras. 198-201

Commentary

65. With a view to making the draft Convention more acceptable to States that might be concerned with its application to certain present or to future practices, article 41 provides the possibility for States to exclude further practices. Article 41 appears within square brackets pending final determination of whether it should be retained (the commentary will be written once article 41 is finalized).

Article 42
Application of the annex

1. A State may at any time declare that it will be bound by:

(a) The priority rules set forth in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

(b) The priority rules set forth in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules, in which case, for the purposes of section I of the annex, registration pursuant to such a system has the same effect as registration pursuant to section II of the annex;

(c) The priority rules set forth in section III of the annex;

(d) The priority rules set forth in section IV of the annex; or

(e) The priority rules set forth in articles 7 and 8 of the annex.

2. For the purposes of article 24:

(a) The law of a State that has made a declaration pursuant to paragraph 1 (a) or (b) of this article is the set of rules set forth in section I of the annex;

(b) The law of a State that has made a declaration pursuant to paragraph 1 (c) of this article is the set of rules set forth in section III of the annex;

(c) The law of a State that has made a declaration pursuant to paragraph 1 (d) of this article is the set of rules set forth in section IV of the annex; and

(d) The law of a State that has made a declaration pursuant to paragraph 1 (e) of this article is the set of rules set forth in articles 7 and 8 of the annex.

3. A State that has made a declaration pursuant to paragraph 1 of this article may establish rules pursuant to which assignments made before the declaration takes effect become subject to those rules within a reasonable time.

4. A State that has not made a declaration pursuant to paragraph 1 of this article may, in accordance with priority rules in force in that State, utilize the registration system established pursuant to section II of the annex.

5. At the time a State makes a declaration pursuant to paragraph 1 of this article or thereafter, it may declare that it will not apply the priority rules chosen under paragraph 1 of this article to certain types of assignment or to the assignment of certain categories of receivables.

References

A/CN.9/455, paras. 122 and 130-132; A/CN.9/466, paras. 188-191, 202 and 203; A/CN.9/486, paras. 119-120 and 169.

Commentary

66. Article 42 is intended to list the choices available to States with regard to the annex and the effects of any such choice made by way of a declaration (permitted under article 1, paragraph 5; see A/CN.9/489, para. 24). States have several alternative choices with regard to the annex. These choices are: to adopt the priority rules of section I and the registration system proposed in

section II of the annex (paragraph 1 (a)); to adopt the priority rules of section I and a registration system other than that proposed in section II (paragraph 1 (b)); to adopt the priority rules of section III, section IV or in articles 7 and 8 of the annex; or to apply their own priority rules with the registration system of section II (paragraph 4). The difference between the choices in paragraph 1 and the choice in paragraph 4 is that, a State would not need to make a declaration to exercise the choice given in paragraph 4. Paragraph 2 sets forth the effect of a declaration, namely that the section of the annex to which the assignor's State has opted into is the law of the assignor's location at the time of the conclusion of the contract of assignment. Paragraph 3 deals with transitional application issues, while paragraph 4 permits States to subject different practices to different priority rules.

Article 43
Effect of declaration

1. Declarations made under articles 36, paragraph 1, 37 or 39 to 42 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. A State that makes a declaration under articles 36, paragraph 1, 37 or 39 to 42 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. In the case of a declaration under articles 36, paragraph 1, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become applicable:

(a) Except as provided in paragraph 5 (b) of this article, that rule is applicable only to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor applies only in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

6. In the case of a declaration under articles 36, paragraph 1, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become inapplicable:

(a) Except as provided in paragraph 6 (b) of this article, that rule is inapplicable to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor is inapplicable in

respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

7. If a rule rendered applicable or inapplicable as a result of a declaration or withdrawal referred to in paragraph 5 or 6 of this article is relevant to the determination of priority with respect to a receivable for which the contract of assignment is concluded before such declaration or withdrawal takes effect or with respect to its proceeds, the right of the assignee has priority over the right of a competing claimant to the extent that, under the law that would determine priority before such declaration or withdrawal takes effect, the right of the assignee would have priority.

References

A/CN.9/445, paras. 79 and 80; A/CN.9/455, paras. 145 and 146; A/CN.9/466, para. 206; and A/CN.9/486, paras. 121-123 and 134.

Commentary

67. Paragraphs 1 to 4 reflect standard treaty law practice. Under paragraphs 1 and 2, declarations made at the time of signature must be confirmed at the time a State declares its consent to be bound; and declarations and confirmations must be in writing and formally notified to the depositary. Under paragraph 3, a declaration takes effect at the same time the Convention enters into force in respect of the State making the declaration. There is a six-month delay if the depositary is notified of the declaration after the entry into force. The six-month period starts at the time of receipt of the formal notification by the depositary and ends on the first day after the expiry of the six-month period. Under paragraph 4, withdrawals of declarations take effect on the first day after the expiry of six months after the receipt of the formal notification by the depositary. Paragraphs 5 through 7 deal with issues relating to the transitional application of the draft Convention.

Article 44
Reservations

No reservations are permitted except those expressly authorized in this Convention.

References

A/CN.9/455, paras. 147 and 148

Commentary

68. Article 44, which reflects standard treaty law practice, is intended to ensure that no reservation is made other than those expressly authorized in articles 36, paragraph 1, 39 to 41 and 42, paragraph 5, that exclude or modify the effect of certain provisions of the draft Convention.

Article 45
Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession with the depositary.

2. For each State that becomes a Contracting State to this Convention after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months

after the date of deposit of the appropriate instrument on behalf of that State.

3. This Convention applies only to assignments if the contract of assignment is concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor apply only to assignments of receivables arising from original contracts concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority in the absence of this Convention, the right of the assignee would have priority.

References

A/CN.9/455, paras. 149 and 150; A/CN.9/466, para. 206; and A/CN.9/486, paras. 127-131.

Commentary

69. Paragraphs 1 and 2 reflect standard treaty law practice. Paragraphs 3 and 4 are intended to ensure that rights acquired before the entry into force of the draft Convention are not affected by it.

Article 46
Denunciation

1. A Contracting State may denounce this Convention at any time by written notification addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

3. This Convention remains applicable to assignments if the contract of assignment is concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor remain applicable only to assignments of receivables arising from original contracts concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority under this Convention, the right of the assignee would have priority.

References

A/CN.9/455, paras. 151-155; A/CN 9/466, para. 206 and A/CN.9/486, paras. 132-133.

Commentary

70. Article 46 is intended to ensure that a Contracting State may denounce the draft Convention. With a view to ensuring certainty, paragraphs 3 and 4 provide that a denunciation does not affect rights acquired before it takes effect.

Article 47
Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

References

A/CN.9/466, paras. 207 and 208; and A/CN.9.486, paras. 135-136.

Commentary

71. Article 47 is a provision found in other UNCITRAL texts (e.g. article 32 of the United Nations Convention on the Carriage of Goods by Sea, 1978, (Hamburg Rules)).

Annex to the draft Convention

Purpose of the annex

References

A/CN.9/420, paras. 155-164; A/CN.9/434, paras. 239-258; A/CN.9/445, paras. 18-44 and 83-93; A/CN.9/455, paras. 18-32 and 120-123; and A/CN.9/486, paras. 137-142.

Commentary

72. Articles 24 to 26 refer priority issues to national law (the law of the assignor's location). However, national priority rules may not exist; they may be outdated or not fully adequate in addressing all relevant problems. For that reason, the annex to the draft Convention, which a State may opt into, contains alternative substantive law priority rules, based on the time of assignment, notification or registration. In order to determine whether their priority rules need revision, States may wish to compare them with the rules set forth in the annex.

73. The rules, set forth in the annex, are intended to serve as a model for national legislation. If a State chooses to enact them by declaration, the choices and effects will be as prescribed in article 42. If a State enacts them independently of the draft Convention, the limitations of article 42 would not apply. There is an additional level of flexibility. These rules do not necessarily form a complete model law. States, therefore, might need to supplement them with additional provisions. For example, if a registration-based system is chosen, some practices may need to be excluded from a registration-based priority regime and subjected to a different priority regime; and the registration rules would need to be supplemented by appropriate regulations. In general, a section of the annex applies only if article 24 applies (i.e. the conditions of the application of the Convention are met and the forum is in a Contracting State) and the assignor's State has made a declaration under article 42 (see also article 1, paragraph 5). The choices available to

States and their effects are set forth in article 42 (see para. 65). As the annex will apply in such a case through articles 24 to 26, the scope and the meaning of the terms in those articles will determine also the scope and the meaning of the terms of the provisions of the section of the annex opted into by the assignor's State.

Section I
Priority rules based on registration

Article 1
Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of the conclusion of the respective contracts of assignment.

References

A/CN.9/445, paras. 88-90; A/CN.9/466, paras. 167 and 168; and A/CN.9.486, paras. 143-145.

Commentary

74. The registration system envisaged in article 1 involves the voluntary entering of certain data about an assignment in the public record. The purpose of such registration is not to create or constitute evidence of property rights, but to protect third parties by putting them on notice about assignments made and to provide a basis for settling conflicts of priority between competing claims. Because of its limited function and for it to be simple, quick and inexpensive, the registration envisaged in article 1 requires a very limited amount of data (specified in article 4 of the annex) to be placed on public record. If no assignee files the required data, the first-in-time assignee prevails.

75. The policy underlying article 1 (and sections I and II) is that giving potential financiers notice about assignments and determining priority in receivables on the basis of a public filing system will enhance certainty as to the rights of financiers. This, in turn, would have a beneficial impact on the availability and the cost of credit on the basis of receivables. The priority rules in section I may operate with an existing national registration system or with a system under section II. Terms used in article 24 and in the provisions of the annex have the same meaning. For example, a person with a right in a receivable derived from a right in another asset should be treated as an assignee (and not as a creditor of the assignor). Accordingly, a conflict between an assignee and such a person would be subject to article 1 and not to article 2 of the annex.

Article 2
Priority between the assignee and the insolvency administrator or creditors of the assignor

The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

References

A/CN.9/466, paras. 169 and 170; and A/CN.9/486, paras. 146-149.

Commentary

76. Article 2 is intended to reflect the principle that, if registration takes place before the commencement of an insolvency proceeding with regard to the assets and affairs of the assignor or before attachment of the receivables in the hands of the assignor, the assignee has priority. In view of the fact that provisions of the annex would apply as a result of the application of article 24, no reference is included to article 25 or the other conditions or limitations of the application of article 24, since they are all implicit.

Section II
Registration

Article 3
Establishment of a registration system

A registration system will be established for the registration of data about assignments, even if the relevant assignment or receivable is not international, pursuant to the regulations to be promulgated by the registrar and the supervising authority. Regulations promulgated by the registrar and the supervising authority under this annex shall be consistent with this annex. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation.

References

A/CN.9/445, paras. 94-103; A/CN.9/466, paras. 171 and 172; A/CN.9/486, paras. 150-153.

Commentary

77. The policy underlying article 3 is that, while the annex should include some basic provisions about registration, the mechanics of the registration process should be left to regulations to be prepared by the registrar and the supervising authority. In principle, the regulations do not need to be more detailed than is practically necessary and the registrar and the supervising authority should have sufficient flexibility in preparing the regulations. For those reasons, article 3 refers to the regulations prescribing "in detail" (but not "exactly") the operation of the registration system. The registrar (who may, presumably, be a private entity) and the supervising authority (which is intended to be an intergovernmental organization) will be entrusted with the task of promulgating the regulations, as well as ensuring the efficient operation of the system.

Article 4
Registration

1. Any person may register data with regard to an assignment at the registry in accordance with this annex and the regulations. As provided in the regulations, the data registered shall be the identification of the assignor and the assignee and a brief description of the assigned receivables.

2. A single registration may cover one or more assignments by the assignor to the assignee of one or more existing or future receivables, irrespective of whether the receivables exist at the time of registration.

3. A registration may be made in advance of the assignment to which it relates. The

regulations will establish the procedure for the cancellation of a registration in the event that the assignment is not made.

4. Registration or its amendment is effective from the time when the data set forth in paragraph 1 of this article are available to searchers. The registering party may specify, from options set forth in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years.

5. Regulations will specify the manner in which registration may be renewed, amended or cancelled and regulate such other matters as are necessary for the operation of the registration system.

6. Any defect, irregularity, omission or error with regard to the identification of the assignor that would result in data registered not being found upon a search based on a proper identification of the assignor renders the registration ineffective.

References

A/CN.9/445, paras. 104-117; A/CN.9/466, paras. 173-178; and A/CN.9/486, paras. 154-159.

Commentary

78. The purpose of article 4 is to establish the basic parameters for an efficient registration system. Those basic parameters include the public character of the registry, the type of data that need to be registered, the ways in which the registration-related needs of modern financing practices may be accommodated and the time of effectiveness of registration. The registry envisaged is a public registry. However, in order to avoid any abuses, limitations may need to be introduced as to who may register (e.g. only persons with a legitimate interest or with the authorization of the assignor) and the assignor may need to be given the right to demand deregistration. In referring to registration "in accordance with this annex and the regulations", paragraph 1 leaves those issues to the regulations. The regulations (or other legislation) could also deal with abusive and fraudulent registration, although this matter should normally not pose a problem, since registration under article 4 does not create any substantive rights. In any case, the issue of any loss caused as a result of an unauthorized or fraudulent registration could be addressed by general tort, fraud or even criminal law rules. The data to be registered, under paragraph 1, include identification of the assignor and the assignee and a brief description of the assigned receivables. The type of identification required is left to the regulations. It is meant to include, however, identification by number. The words "brief description" are intended to include a generic description, such as "all my receivables from my car business" or "all my receivables from countries A, B and C". The sufficiency of a non-specific description of the receivables is also left to the regulations.

79. Paragraphs 2 and 3 are key provisions in that they are intended to ensure the efficient operation of the registration system and to accommodate the needs of significant transactions. Under paragraph 2, a single notice could cover a large number of receivables, existing or future, arising from one or several contracts, as well as a changing body of receivables and a constantly changing amount of secured credit (revolving credit). Without these features, registration would be expensive, slow and inefficient. Any abuse, which could harm the assignor but could not create any substantive rights, is left to the regulations or other legislation. Under paragraph 3, registration may take place even before an assignment is made. For the assignee to be able to release funds, there is a need to ensure that registration can be effected as soon as possible. The regulations may prescribe the way in which this pre-registration may be effected.

80. Under paragraph 4, registration or its amendment is effective when searchers are able to obtain access to the data registered. This means that, if the assignor becomes insolvent after registration but before the data become available to searchers, the risk of any events that may

affect the interests of the registering party is placed on that party. Such a risk would be significantly reduced if there is no time gap between data being registered and becoming available to searchers, which is possible in the case of a fully computerised registration system. Paragraph 4 permits registering parties to choose the length of time of effectiveness from a range of options set out in the regulations. In the absence of a choice, the time of effectiveness is five years. Renewals, discharges and amendments, as well any other matter necessary for the operation of the registry, are left to the regulations (paragraph 5). With a view to preserving registrations with minor errors, paragraph 6 invalidates a registration only if there is a defect, irregularity or omission in the identification of the assignor that would preclude searchers from finding the data registered. The underlying rationale is that: if the error is made by the registering party, that party should suffer the consequences; and if the error is committed by the registrar, the registrar should be held liable (an issue that may be addressed in the regulations or general law). The words "would result" are intended to ensure that the registration would be ineffective, in the case of a significant error in the identification of the assignor, even if no one was actually misled.

Article 5
Registry searches

1. Any person may search the records of the registry according to identification of the assignor, as set forth in the regulations, and obtain a search result in writing.

2. A search result in writing that purports to be issued by the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the registration of the data to which the search relates, including the date and hour of registration.

References

A/CN.9/445, paras. 118 and 119; A/CN.9/466, paras.179 and 180; and A/CN.9/486, paras. 160-161.

Commentary

81. Article 5 is intended to enshrine the principle of public access to the registry for searching purposes as opposed to registration purposes. Only a publicly accessible registry could provide the transparency necessary with regard to the rights of third parties. Such public access to the registry does not infringe upon the level of confidentiality necessary in financing transactions, since only a limited amount of data would be available in the registry. Article 5 also provides for the admissibility and the general evidential value of a search record in a court or other tribunal. A search record is, in particular, evidence of the registration and its date and hour.[3]

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[3] The commentary on articles 6 to 9 of the annex will be written once those articles are finalized pursuant to a proposal to be submitted by States (see A/CN.9/486, paras 163, 165 and 168).